

PCC Structurals, Inc., formerly named Precision Castparts Corp. and United Steelworkers of America, AFL-CIO-CLC. Cases 19-CA-24902, 19-CA-24905, 36-CA-7957-1, 36-CA-7957-2, 36-CA-7979-1, and 36-CA-7979-2

March 17, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On November 13, 1998, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order as modified.³

For the reasons stated by the judge and for the additional reasons explained below, we find that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Patrick Maloney, notwithstanding the Respondent's assertion that it took action against Maloney in order to protect a disabled employee from alleged harassment and to comply with the Americans With Disabilities Act (ADA). We also find that the Respondent violated Section 8(a)(1) by its previous issuance of three disciplinary warnings to Maloney and by its threat of adverse action when it warned another employee not to associate with Maloney.

The material events occurred in the setting and aftermath of a representation election, held on October 10-11, 1996, in which the Steelworkers unsuccessfully sought to become the bargaining representative for most of the Respondent's employees. This election was the second attempt by the Union to win certification; an earlier election, in which the Union was also unsuccessful, had been held in July 1995. The Union filed objections related to the second election (the October election), but these were

overruled and the results of the election were officially certified on April 23, 1997. Maloney was suspended on April 4 and discharged on April 10, 1997, 13 days before the Board's final disposition of the Union's objections.

Prior to the 9-day hearing in this case, the parties reached a settlement agreement that disposed of most of the allegations in the General Counsel's amended complaint. The remaining allegations pertained to the disciplinary actions the Respondent took against Maloney and to a warning allegedly given by Bob Runyon, allegedly a PCC supervisor, to Grant Doty, another employee, against associating with Maloney.⁴ The settlement agreement also included a stipulation in which the parties authorized the judge to make certain assumptions of fact, as discussed below.

On the basis of the stipulation and the evidence presented, the judge found that the Respondent enforced its no-solicitation policy against Maloney in a discriminatory manner prior to the election; that the Respondent, through Runyon, made an unlawful threat to Doty; and that the Respondent gave Maloney an unlawful disciplinary warning on January 15, 1997, for engaging in a verbal exchange with another employee concerning the Union.

With respect to Maloney's ultimate suspension and discharge, the judge found that the General Counsel had made an "exceedingly strong" prima facie case that the Respondent acted with discriminatory intent under the test established in *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The judge also found that the Respondent had failed to sustain its *Wright Line* burden of showing that Maloney would have been suspended and terminated even if he had not engaged in protected conduct.

The Respondent filed exceptions to the judge's decision. We find no merit in them for the reasons explained in the judge's decision and those explained below.

1. The October 1996 warnings to Maloney relating to solicitation

We agree with the judge that the two warnings which the Respondent gave Maloney on October 3 and 8, 1996, respectively, for campaigning for the Union in violation of the Respondent's no-solicitation policy, were unlawfully discriminatory. We review the facts material to this finding because they are also relevant to Maloney's ultimate discharge.

The first warning resulted from several conversations Maloney had with supervisors and other employees on October 2, while he was visiting the Respondent's satellite facilities in the course of a work assignment, and from an additional hallway conversation Maloney had

¹ The Respondent has also requested oral argument with respect to the application of the Americans With Disabilities Act to this case. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ We shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997). We also correct an erroneous reference in the judge's decision to the date of "May 26, 1997," by which the judge was clearly referring to an investigatory interview which was alleged to have occurred on March 26, 1997.

⁴ Certain evidence pertaining to some of the allegations resolved in the settlement agreement was admitted at the hearing. For the purpose of this decision, we cite only the evidence which is most relevant to the allegations concerning Maloney.

with another employee about the Union during his lunchbreak the following day. Maloney was given the warning orally by one of the Respondent's human resources generalists, Kim Schwanz, and another management official, shortly after the latter conversation.

It is not entirely clear from the judge's opinion whether he found the warning to be unlawful with respect to the October 2 conversations because he found that Maloney was not engaging in solicitation, or because he found that Maloney was engaging in union solicitation but that the Respondent would have permitted solicitation of any other kind. In either case, however, we agree that the credited evidence shows that the Respondent had a longstanding policy of tolerating informal conversations between employees on subjects other than the Union in hallways and in work areas.⁵ The warning therefore constituted a disparate enforcement of the Respondent's rules and violated Section 8(a)(1). See, e.g., *Opryland Hotel*, 323 NLRB 723, 728–729 (1997); *Cumberland Farms, Inc.*, 307 NLRB 1479, 1490–1491 (1992), enf'd. 984 F.2d 556 (1st Cir. 1993); *Keko Industries*, 306 NLRB 15, 19 (1992).⁶

The second warning was given after Maloney requested and used vacation time to extend his lunchbreak for 1 hour on October 7 and 8, 1996, in order to campaign for the Union on nonworktime. Maloney used this additional time on those 2 days to converse with employees in the lunchroom and in the hallway and to distribute literature in the Respondent's driveway. On October 8, he was given a written warning by Schwanz and other management officials for campaigning on company work time and in company work areas. This warning also violated Section 8(a)(1) because Maloney was campaigning on his own time and, as noted above, the Respondent permitted conversations between employees on nonunion topics at its facilities.

⁵ The Respondent's general stipulation that the judge "may assume the discipline and discharge of Maloney took place in an environment that included the conduct by supervisors or agents alleged in [certain specified] sections of the Consolidated Complaint, as amended," encompassed specific allegations that the Respondent, from July 1, 1996, onward, "prohibit[ed] union solicitations and distributions while permitting nonunion solicitations and distributions; allow[ed] anti-union employees to circulate an anti-union petition on work time and/or in work areas; encourag[ed] employees to contact the anti-union committee members on work time; prohibit[ed] discussion of the union in work areas and on work time by pro-union employees; and prohibit[ed] discussions of the union by pro-union employees on breaks and in non-work areas, but [did] not similarly restrict anti-union employee discussions of the Union." While the Respondent denied having committed any of this misconduct with respect to Maloney, these admissions confirm that the Respondent was attempting to inhibit pronoun activity through disparate enforcement of its no-solicitation rules at the time the October warnings were issued and after the election.

⁶ With respect to Maloney's lunchbreak conversation, the warning was per se unlawful because the conversation did not occur during worktime. See *Opryland Hotel*, supra, 323 NLRB at 728; *Our Way, Inc.*, 268 NLRB 394 (1983).

2. The threat to Grant Doty against associating with Maloney

We also agree with the judge that Bob Runyon's warnings to employee Grant Doty not to associate with Maloney constituted an unlawful threat. Doty testified, without contradiction, that Runyon, who was his former area manager, approached him sometime within a few days before the October 1996 election, immediately after Doty had a conversation with Maloney. Runyon asked him if he and Maloney had been discussing the Union. Doty testified that when he replied in the affirmative, Runyon told him that "I should watch what I talk about, and who I hang with, because all levels of management was watching Pat [Maloney] at this time, and they were going to get Pat at no expense. He [Runyon] made a remark that they were going to cut his balls off."

The Respondent contends that Runyon was not a supervisor at the time the conversation occurred and therefore could not have made an unlawful threat attributable to the Respondent.⁷ For the following reasons, we find that Runyon's statements are attributable to the Respondent under the established test for agency, recently reiterated in *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426 (1998). We therefore need not determine whether Runyon was in fact a supervisor, as the judge found.

Agency may be found on the basis of actual or apparent authority to act for the principal, in this case the employer. Apparent authority is present where there is a "manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal had authorized the alleged agent to perform the acts in question." *Id.*, citing *Southern Bag Corp.*, 315 NLRB 725 (1994), and other authorities. More specifically, with respect to alleged threats by an employer, the question is "whether, under all the circumstances, the employees 'would reasonably believe that the employee in question . . . was reflecting company policy and speaking and acting for management.'" *Hausner*, supra, quoting *Waterbed World*, 286 NLRB 425, 426–427 (1987), enf'd. 974 F.2d 1329 (1st Cir. 1992).

There is no dispute that Runyon had been an area manager—i.e., a member of the Respondent's management—before the above conversation occurred. Although it appears that his managerial position changed a few months before the conversation, the Respondent does not contend that it ever communicated to its employees that Runyon's essential authority had been circumscribed. On the contrary, the Respondent confirmed to its employees—in writing—that Runyon retained a

⁷ The Respondent also contends that the issue of the alleged threat to Doty had been resolved in the parties' settlement agreement and consequently was not before the judge. However, the settlement agreement explicitly excluded from its coverage a subparagraph in the General Counsel's complaint alleging that Runyon, on October 9, 1996, the day before the election, threatened "its employees" with retaliation if they associated with Maloney.

supervisory title less than a month before the election, by including his name on a self-styled "Supervisor List" of 171 supervisors and managers which it posted on September 19, 1996.

Doty also testified that at the time of the conversation he viewed Runyon as still being a member of the Respondent's management, in part because he had observed Runyon recently accompanying other management officials on periodic monitoring tours of the Respondent's facilities. Finally, as the judge noted, all but one of the other witnesses who testified as to Runyon's status—including former Supervisor Suzanne Whittington—believed that Runyon held either management or supervisory status in October 1996.⁸

In view of this evidence, we have no difficulty in concluding that Doty could reasonably have believed that Runyon was "reflecting company policy and speaking and acting for management" when he made the statements at issue. Runyon's previous status as an area manager, combined with the Respondent's public characterization of him as a supervisor, establish a "manifestation creating a reasonable basis" for Doty to have believed that Runyon was authorized to speak for management. We therefore agree that Runyon's warning to Doty not to associate with Maloney constituted a threat attributable to the Respondent and violated Section 8(a)(1).

3. The January 15, 1997 warning to Maloney

For the reasons stated by the judge, we agree that the verbal exchange between Maloney and Ron King, an antiunion employee, on January 8, 1997, constituted protected conduct with respect to both employees, and that the warning issued to Maloney on the basis of this exchange was unlawful. We review the facts material to this finding because they are also relevant to Maloney's ultimate discharge.

The credited evidence establishes that King and another employee opposed to the Union, Terri Trexler, had set up a table in the Respondent's lunchroom with several large posters encouraging employees to request that the union authorization cards they had signed be returned to them. King and Trexler also had a petition requesting such returns, which they were urging employees to sign. Maloney approached the table, and a heated exchange ensued between King and Maloney over the meaning of the October election result. King filed a written complaint about the incident with the Respondent, in which he alleged that Maloney, "in an intimidating manner . . .

⁸ Even Human Resources Official Kim Schwanz, who testified at one point that Runyon was not a supervisor, also stated that Runyon was "a program manager working training issues." Runyon did not testify at the hearing, which supports the adverse inference that he was an agent of the Respondent and that he conveyed the threat alleged by Doty. *United Parcel Service*, 321 NLRB 300 fn. 1 (1996); *Property Resources Corp.*, 285 NLRB 1105 fn. 2 (1987), enf'd. 863 F.2d 964, 966 (D.C. Cir. 1988).

impl[ie]d that he was threatening me with possible legal action" and "harassed [me] by the implication that he was going to come back to take my picture." King's complaint also alleged that Maloney "stood in front of the table with his hands folded in front in an intimidating manner" and in a "menacing manner."

Based on King's complaint, Schwanz gave Maloney a formal warning on January 15.⁹ Since Maloney's conduct was clearly within the ambit of Section 7 of the Act, and he took no violent or threatening action that would deprive him of protection,¹⁰ the warning violated Section 8(a)(1).¹¹

4. Maloney's suspension and discharge

We agree with the judge's conclusion that Maloney would not have been suspended or terminated if he had not engaged in protected conduct, despite the Respondent's contention that it acted against Maloney only in an effort to comply with the ADA.

The Respondent does not dispute, and we agree, that the General Counsel established that unlawful union animus was a motivating factor in the Respondent's suspension and termination of Maloney under the *Wright Line* test. First, the Respondent stipulated that "in February 1997, [it] threatened an employee [other than Maloney] with lack of promotion because the employee continued to support the Union"; that "from about July 6[, 1996] through about May 1997 . . . by its supervisors, [it] threatened retaliation, disciplinary action, and termination if employees continued to engage in Union and other protected concerted activities"; and that it "about April 4, 1997 . . . suspended its employee Fred Wyatt for three days . . . and issued Wyatt a formal written warning . . . because Wyatt formed, joined and assisted in the Union and engaged in protected concerted activities, and to discourage employees from engaging in these activities." These admissions, while not bearing directly on Maloney's discharge, confirm that the Respondent was actively threatening union activists and targeting them for disciplinary action at the time Maloney was discharged.¹²

⁹ The Respondent also contended that Maloney verbally harassed King in a subsequent hallway incident. The judge, however, found that there was insufficient evidence to establish this allegation, and that in any case the warning Maloney received was based solely on the lunchroom incident.

¹⁰ As the judge noted, Schwanz did not inquire, and King did not explain, how a person's hands could be folded in an "intimidating" or "menacing manner."

¹¹ We note that although the General Counsel's complaint alleged that the October 3 and 8, 1996, and January 15, 1997 warnings to Maloney violated Sec. 8(a)(3) and (1), the judge made findings only with respect to Sec. 8(a)(1). Since the General Counsel and the Charging Party did not file exceptions on this point, we do not address these allegations with respect to Sec. 8(a)(3).

¹² The Respondent takes exception to the judge's having admitted testimony from a number of witnesses on the Respondent's unlawful conduct toward employees other than Maloney and Doty, because the allegations concerning that misconduct were resolved in the parties' settlement agreement. It is possible that this testimony was redundant

Second, the credited evidence established that PCC Human Resources Vice President Mark Damien, during a conversation with Maloney about the Union in September 1996, the month before the election, said, “I just want you to know . . . anybody that fucks me, I’ll get even with them, no matter what it takes, no matter how long it takes.”

Third, Runyon’s October 1996 warning to Doty that “all levels of management” were “watching” Maloney, that “they were going to get Pat at no expense,” and that “they were going to cut his balls off,” directly indicated that the Respondent would continue to target Maloney for having engaged in protected conduct. Further, the unlawful warning given to Maloney on January 15, 1997, for articulating his pronoun views to Ron King, and the earlier unlawful October 3 and 8 warnings for his union solicitation, discussed above, similarly show that the Respondent was targeting Maloney on an ongoing basis for his union activities.

Finally, the credited evidence establishes that on January 21, 1997, Damien, Schwanz, and another supervisor followed up on the January 15 warning by visiting Maloney in his work area, where Damien warned him not to “harass” anyone and said that Maloney had taken the issue of the Union “to a level way beyond [what] anybody expected,” and that “[y]ou better watch out, you better not make any mistakes, because there’s nobody in this corporation that’s going to lend a hand to help you.”

Under the *Wright Line* analysis, in the face of this showing that the Respondent acted against Maloney from union animus, the burden shifts to the Respondent to show that Maloney would have been suspended and discharged even if he had not engaged in protected union activity. The Respondent attempts to make this showing by contending that it discharged Maloney for harassing Cheryl Green, an employee who suffered from progressive rheumatoid arthritis and was sometimes confined to a wheelchair. According to the Respondent, its actions against Maloney were authorized and even required by the ADA, and the Respondent would have faced exposure to an ADA lawsuit had it failed to take those actions.¹³ The Respondent also asserts that the judge failed to consider the ADA ramifications in this case, and that the Board has not previously addressed employer disciplinary actions purportedly taken under the authority of the ADA.

It is certainly true that the Board must be mindful of the requirements of the ADA wherever those requirements would be applicable in a case before us. It is not true, however, that the Board has not previously reviewed an employer’s assertion that a disciplinary action alleged to be contrary to the Act was justified under the ADA. In *Handicabs, Inc.*, 318 NLRB 890 (1995), enf’d. 95 F.3d 681 (8th Cir. 1996), cert. denied 117 S.Ct. 2508 (1997), the Board addressed just such a case and found that the employer had discharged an employee due to union animus, not due to ADA-related concerns as the employer contended. Moreover, in enforcing the Board’s remedial order, the Eighth Circuit observed that an employer’s “impermissible generalization about persons with disabilities . . . cannot bring its [unlawful] policy under the protection of the disability laws.” 95 F.3d at 685.

It is therefore clear that the ADA does not bar the Board from finding that an employer’s disciplinary action has violated the NLRA in a situation involving an individual who might be protected by the ADA under certain circumstances. When an employer asserts that it disciplined an employee in order to protect another, disabled employee from a work environment alleged to have been “hostile” within the scope of the ADA, we apply the *Wright Line* analysis and evaluate the evidence supporting that assertion for its appropriate weight, just as we evaluate any other evidence of motivation.

In this context, we must also consider the ADA’s own relevant requirements, as they have been interpreted by the courts and the EEOC.¹⁴ We note first that in order for alleged harassment to make an employment environment “hostile” for a disabled employee within the meaning of the ADA, the harassment must be directly related to the person’s disability. See, e.g., *Walton v. Mental Health Assn. of Southeastern Pennsylvania*, 168 F.3d 661, 667 (3d Cir. 1998); *Haysman v. Food Lion, Inc.*, 893 F.Supp. 1092, 1108 (S.D.Ga. 1995). As the Respondent points out, citing *Hendler v. Intelcom USA*, 963 F.Supp. 200, 209 (E.D.N.Y. 1997), an employee confined to a wheelchair who is chided for not being able to climb stairs is being harassed on the basis of his/her disability. However, such harassment does not necessarily occur where the same employee is the subject of a negative comment in no way related to his/her dependence on a wheelchair.

in view of the parties’ quoted stipulations. The testimony was relevant, however, to the determination of the Respondent’s motivation for discharging Maloney.

¹³ The Respondent has also contended that additional alleged misconduct by Maloney motivated his discharge. However, most of the other alleged misconduct consists of the actions Maloney took which led to the unlawful October 3 and 8, 1996, and January 15, 1997 disciplinary warnings discussed above. Moreover, as discussed below, the Respondent has not been consistent in stating the reasons for the discharge.

¹⁴ While it is not the Board’s place to determine whether a disabled person actually had a viable ADA claim, the basic parameters of the ADA are relevant to our determination of whether an employer’s disciplinary action was motivated by union animus. To evaluate an employer’s ADA defense, we must have an elementary understanding of the ADA’s scope. Accordingly, where a given situation clearly could not fall within the ADA, an employer’s credibility in asserting otherwise would be weak. By contrast, where a situation clearly involves harassment directly related to a person’s disability, the employer’s assertion of an ADA motivation would be more credible.

Second, not every dispute between one employee and another who happens to be disabled is, per se, disability related. See *Walton*, 168 F.3d at 667, quoting *Uhl v. Zalk Josephs Fabricators, Inc.*, 121 F.3d 1133, 1137 (7th Cir. 1997) (“A personality conflict doesn’t ripen into an ADA claim simply because one of the parties has a disability”). For this reason, neither the EEOC nor any court has equated an employer’s duty to provide accommodation for a disabled employee with an obligation to discipline every employee with whom the disabled employee might have an interpersonal conflict.

Third, to constitute harassment within the scope of the ADA, workplace misconduct must be sufficiently severe or pervasive that a reasonable person in the disabled person’s condition would perceive it as creating an abusive working environment. See *Ellison v. Brady*, 924 F.2d 872, 879–880 (9th Cir. 1991). See also *Fuller v. City of Oakland, Calif.*, 47 F.3d 1522, 1527 (9th Cir. 1995) (following *Ellison*).¹⁵ Accordingly, while the Respondent is correct that under the ADA alleged harassment must be assessed through the eyes of the victim, the victim’s perception may not unreasonably characterize interpersonal problems as unlawful harassment.

Under the guidance of this authority, we note first that the Respondent, in its briefs, and all the witnesses in this case, including Cheryl Green, the employee Maloney allegedly harassed, agree that the negative feeling between Maloney and Green originated directly from the outcome of the October 1996 election and from their diverging views on the need for a union. Maloney was one of the leaders of the union campaign in both the July 1995 and the October 1996 elections. For about a month before the October 1996 election, Green shared an enclosed workbooth with Maloney, who at his own volition was training her to be an X-ray interpreter. During that time their relationship was, in Green’s words, “wonderful.” However, shortly before the election, Green indicated to Maloney that she was changing her position from support for the Union to opposition. The day after the election, when Maloney came to work extremely dejected over the result, Green told him, “Well, just get over it. You lost, we won. Get over it.”

From the time of the October 1996 election to the day of Maloney’s suspension the following April, Maloney and Green continued to share the same workbooth. However, because Green moved to the second shift in November, the direct contact between them was limited to the end of the day shift, when Green would arrive for work and Maloney was preparing to leave. During this 6-month period, notwithstanding Green’s alleged perception that she became the victim of harassment by Ma-

loney, there is virtually no evidence in the record that Maloney took any action or made any negative communication to Green relating to her disability.

The only alleged incident in which Maloney said anything that could even arguably have fallen within the definition of ADA harassment occurred when he had a conversation with Green in which he admittedly used the term “faker.” However, Maloney’s testimony establishes that on that occasion it was Green who first used the term in the course of showing Maloney a pamphlet about her disease. Green had not yet begun to use a wheelchair, but she told Maloney that she wanted him and other PCC employees to know how serious the disease was because, she said, other employees thought she was “faking” her symptoms. Maloney looked over the pamphlet she offered him and asked Green if she believed she would eventually be confined to a wheelchair. Maloney testified that when Green replied, “Yes,” he said, “That’s pretty heavy . . . You’d have to be really suffering, or you must be a pretty good faker.” No more was made of the exchange at the time, and Maloney testified that he meant his comment to be sympathetic.¹⁶

The judge found Maloney to be a highly credible witness, and credited his version of the material facts in all instances where it conflicted with other witnesses’ testimony. Like the judge, we do not believe that Maloney’s comment, in the above context, could reasonably have been considered harassment by Green or Schwanz, the management official who discharged Maloney.

Further, the only credited incidents in which Maloney may have said anything even generally negative to Green occurred when he voiced some dissatisfaction with the manner in which the Respondent made unilateral alterations in the small workbooth they shared in order to accommodate her disability without consulting or prenotifying him; and on one other occasion when she asked him to move a large piece of equipment out of the workbooth at a time when he was in a hurry to go home. Although Green also alleged that “someone” was continuously tampering with a drawstring she had attached to the door of the workbooth, and was moving her paper towel rack to a higher spot in the workbooth which was more difficult for her to reach, neither she nor any other witness claimed to have seen Maloney tamper with either item, and he denied having done so.¹⁷ Like the judge, we cannot credit Schwanz’ assertion that he believed Green was the victim of a hostile work environment created by Maloney on the basis of such evidence.

¹⁶ Maloney also testified that when other employees asked him whether Green was faking a disability, he would respond that he did not know if she was faking or not.

¹⁷ Green also testified that another employee had told her that he or she observed Maloney tamper with the drawstring. As the judge noted, however, Green could not remember the name, or even the gender, of that employee. Nor, at the time she complained to Schwanz, did she indicate to him or to anyone else that another employee had given her such information. The judge accordingly found this claim not credible.

¹⁵ *Ellison* and *Fuller* involved sexual harassment claims based on Title VII of the Civil Rights Act. However, the courts have analyzed harassment claims based on the ADA under the same standards as under Title VII. E.g., *Morgan v. City & County of San Francisco*, 1998 WL 30013 * 7 (N.D. Calif. Jan. 13, 1998), and the cases cited therein.

The Respondent also cites several other instances in which Green complained about Maloney. The credited evidence, however, shows that the misconduct alleged in these incidents was unrelated to Green's disability and was not even clearly hostile, let alone of a harassing nature. On March 10, 1997, when the Union's election objections were still pending before the Board, Green found a one-sentence message written by Maloney on a chalkboard located in her and Maloney's work area: "What do you want, to play games or make a change?"¹⁸ Believing the message was directed at her, Green complained to her supervisor and wrote "Please explain who is you?" on the chalkboard, signing her name. Her query was later replaced with the message, "HOO IZ YOU!" Green assumed that this response came from Maloney, took offense, and filed a written complaint with Schwanz.¹⁹

On April 3, the day before Maloney was suspended, Green found that Maloney had replaced a biblical quotation she had written on the chalkboard with "Give to Caesar what is Caesar's, give to the Lord what is the Lord's, and give to the Steelworkers PCC." Green complained to Schwanz that this message, which Maloney had admittedly written, was "blasphemy" and a "direct insult" to her; and Schwanz testified that he viewed the incident as "retaliation" by Maloney against Green for her having complained about him earlier. Schwanz also testified that this incident was the "final straw" leading to Maloney's suspension and discharge. None of the messages that offended Green, however, were related to Green's disability. Like the judge, we do not credit Schwanz' assertion that he considered the chalkboard incidents to be "harassment" of a disabled person.

In addition, Green's credibility is undermined by the testimony of Mo Fitzpatrick, an employee witness whom the judge found to be more credible than Green, that the day after Maloney was discharged she overheard Green say to another antiunion employee, "We got him. We got him. We got Pat Maloney." While this statement cannot be attributed to the Respondent (since Green was not the Respondent's agent), it further weakens the credibility of Green's assertion that she complained to Schwanz solely for the purpose of obtaining protection from harassment, and also the force of the Respondent's assertion that it acted only for the purpose of providing her with that protection.²⁰

Finally, while insisting that its actions were motivated by ADA concerns, the Respondent has been far from

consistent in stating its reason or reasons for discharging Maloney. As noted above, Schwanz, who made the discharge decision, testified that the "Give to Caesar" chalkboard incident was the "final straw" with respect to Maloney, and that he perceived the incident as "retaliation" by Maloney against Green for having complained about Maloney a few days before. The following day, however, when Schwanz informed Maloney that he was being placed on suspension pending an investigation, he did not even mention that incident. Schwanz did, however, cite to Maloney the unlawful October 3 and 8 and January 15 warnings discussed above, which were not a permissible basis for Maloney's suspension or subsequent discharge. On that occasion Schwanz also cited a harassment complaint against Maloney he had received from Ted Blakely, another antiunion employee. On April 10, when Maloney was terminated, Schwanz told him that Blakely's complaint, along with Green's, had been determined to "have merit." At the hearing, however, Schwanz testified that Blakely was "probably overreacting a little bit," and that his complaint was "a little shaky."²¹

Schwanz also testified at several points that Maloney's discharge was based solely on his alleged harassment of Green, and that Maloney would have been terminated even if he had committed no other misconduct. As noted above, however, Schwanz also repeatedly indicated that the alleged harassment of Green was not the only reason for the discharge. In addition, when asked during a pre-hearing deposition if Maloney would have been terminated solely on the basis of Green's complaint if he had received no prior warnings, Schwanz replied, "Well, maybe; maybe not." While an employer may have more than one reason for disciplining an employee, these inconsistencies further weaken the force of the Respondent's contention that it acted against Maloney purely for lawful motives. *Black Entertainment Television*, 324 NLRB 1161 (1997).

Moreover, Schwanz' admission that Maloney would "maybe/maybe not" have been discharged if he had not received the previous unlawful warnings precludes a *Wright Line* showing by the Respondent that Maloney would have been terminated even if he had not engaged in protected conduct. Accordingly, even if we were to assume for the sake of argument that the Respondent was motivated in part by ADA-related concerns, the Respondent could not meet its *Wright Line* burden as a consequence of this admission.²²

¹⁸ The chalkboard had been placed in the enclosed work area by Fred Wyatt, another employee who worked there, for his and other employees' personal use. By established custom, Wyatt, Maloney, Green, and other employees wrote public messages on this blackboard according to their personal whims.

¹⁹ Maloney denied having written this message.

²⁰ Green also testified that she had earlier complained to Schwanz that Maloney was writing pronoun messages on the chalkboard in their work area, which she considered "overstepping the boundary."

²¹ Blakely's complaint was based on verbal exchanges in which Maloney and Wyatt commented, within his hearing, on the outcome of the October election and their related disappointment. Schwanz testified that Blakely also told him that "on a regular basis he was hearing Pat and Fred Wyatt talk constantly about who supported the Union and who did not, and . . . about they've put their butts on the line and for all these people, and this is the thanks they're getting."

²² Member Hurtgen concludes that the Respondent would prevail if it had shown that it would have discharged Maloney based solely on a

For the reasons discussed above, however, we find that there is insufficient evidence to support the Respondent's contention that it believed Maloney "harassed" Green at all, let alone believed he harassed her within the terms of the ADA.²³ Like the judge, we find it implausible that Schwanz or any other management official decided that a highly skilled, 13-year employee (whose work performance and technical abilities were never at issue) deserved to be discharged on the basis of Green's complaints and the evidence supporting them. We consequently find that the Respondent, in the face of the showing of unlawful discrimination made by the General Counsel, has not borne its *Wright Line* burden of establishing that Maloney would have been suspended and discharged even if he had not engaged in conduct protected under the Act.²⁴ Accordingly, we find that the Respondent's suspension and discharge of Maloney violated Section 8(a)(3) and (1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, PCC Structurals, Inc., formerly named Precision Castparts Corp., Portland and Clackamas, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing verbal and written warnings to employees in retaliation for their activities on behalf of the United Steelworkers of America, AFL-CIO-CLC, in order to cause them to discontinue such lawful activities.

(b) Interfering with, restraining, or coercing employees by threatening them with adverse action in the event they are seen speaking with known supporters of the Union.

(c) Suspending, discharging, or otherwise discriminating against employees because of their activities on be-

reasonable fear of a successful ADA lawsuit. That is, the Respondent need not show an actual ADA violation. Member Hurtgen nonetheless agrees that the Respondent has not met the requisite burden.

²³ We find it unnecessary to analyze the comparative evidence relating to the discipline the Respondent had previously imposed on other employees in enforcing its no-harassment policy because it is clear from the evidence that, unlike here, those cases involved instances of actual harassment rather than mere interpersonal friction.

²⁴ Contrary to the Respondent's contention, the judge did not substitute his own "business judgment" for the Respondent's in determining that Maloney was discharged unlawfully. The judge found, and we agree, that the Respondent's action was unlawful because the Respondent acted from union animus rather than from the motive of complying with the ADA, and that Maloney would not have been discharged if he had not engaged in protected conduct. In *Ryder Distribution Resources*, 311 NLRB 814 (1993), cited by the Respondent, the judge improperly based a determination that the employer unlawfully discharged a group of employees solely on his own business analysis purporting to show that the employer would have had a profitable year if it had not discharged anyone. In this case, by contrast, the judge's determination of the Respondent's motive is not based on any speculative market or business analysis, but directly on the evidence in the record.

half and in support of the Union or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at the Respondent's facilities signed copies of the attached notice marked "Appendix."²⁵ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 3, 1996.

(b) Within 14 days from the date of this Order, remove from its files any reference to the verbal and written warnings given to Patrick Maloney in retaliation for his union activity, as specified in the Board's decision, and any reference to his unlawful suspension and discharge, and within 3 days thereafter notify him in writing that this has been done and that the warnings, suspension, and discharge will not be used against him in any way.

(c) Within 14 days from the date of this Order, offer Patrick Maloney full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(d) Make Patrick Maloney whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at-

²⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

testing to the steps that the Respondent has taken to comply with this order.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act by issuing verbal and written warnings to employees in retaliation for their activities on behalf of the United Steelworkers of America, AFL-CIO-CLC.

WE WILL NOT threaten employees with adverse action in the event they are seen speaking with known supporters of the Union.

WE WILL NOT suspend, discharge, or otherwise discriminate against employees because of their activities on behalf and in support of the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the verbal and written warnings given to Patrick Maloney in retaliation for his union activity, and any reference to his unlawful suspension and discharge, and notify him in writing that this has been done and that the warnings, suspension, and discharge will not be used against him in any way.

WE WILL, within 14 days from the date of the Board's order, offer Patrick Maloney full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Patrick Maloney whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against him.

PCC STRUCTURALS, INC., FORMERLY NAMED PRECISION
CASTPARTS CORP.

Linda J. Scheldrup, Esq., for the General Counsel.
Jerome L. Rubin, Esq., *Chris Kitchel, Esq.*, and *Eileen Drake, Esq. (Stoel Rives, LLP)*, of Seattle, Washington, for the Respondent.

John Bishop, Esq. (Bennett, Hartman, Reynolds & Wiser), of Portland, Oregon, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice a hearing in this matter was held before me in Portland, Oregon, on May 26, 27, 28, and 29 and June 1, 2, 3, 4, and 5, 1998. The initial charge in Case 19-CA-24902 was filed on November 18, 1996, by United Steelworkers of America, AFL-CIO-CLC (the Union). Thereafter, on November 18, March 25, and April 21, 1997, additional charges were filed by the Union.

On January 15, 1998, the Regional Director for Region 19 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated complaint and notice of hearing alleging violations by PCC Structurals, Inc., formerly named Precision Castparts Corp. (the Respondent), of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Thereafter, on May 12, 1998, the Regional Director for Region 19 of the Board issued an amendment to consolidated complaint. The Respondent, in its answers to the consolidated complaint and the amendment to consolidated complaint denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel) and counsel for the Respondent. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is an Oregon corporation with offices and facilities located in Portland and Clackamas, Oregon, where it is engaged in the business of manufacturing jet engine components and other types of steel castings. In the course and conduct of its business operations the Respondent annually sells and ships goods and provides services valued in excess of \$50,000 to customers located outside the State of Oregon. It is admitted and I find that the Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Settlement Agreement and Stipulation

On May 26, 1998, on the commencement of the hearing, the parties entered into an extensive settlement agreement, approved by me, providing for the posting of an appropriate notice, an affirmative make-whole remedy for Fred Wyatt, one of two alleged discriminatees, and monetary reimbursement to

employees who did not attend a rally, sponsored by the employer, for which attendees were paid. The settlement agreement specifically provides that “[b]y entering into this settlement agreement, Respondent does not admit to any violation of the National Labor Relations Act.” Incorporated as a part of the settlement agreement is a stipulation pertaining to the issues remaining to be litigated here, namely, an alleged threat to one employee, and a series of alleged unlawful warnings culminating with the alleged unlawful discipline and termination of Patrick Maloney. The stipulation contains, *inter alia*, the following language:

Respondent stipulates that the Administrative Law Judge may assume the discipline and discharge of Maloney took place in an environment that included the conduct by supervisors or agents alleged in the following sections of the Consolidated Complaint, as amended.

....
2. Paragraph 7(d) with respect to the following allegations only: “prohibiting union solicitations and distributions while permitting nonunion solicitations and distributions; . . . by allowing anti-union employees to circulate and anti-union petition on work time and/or in work areas; . . . by encouraging employees to contact the anti-union committee members on work time . . . by prohibiting discussion of the union in work areas and on work time by pro-union employees; and by prohibiting discussions of the union by pro-union employees on breaks and in non-work areas, but not similarly restricting anti-union employee discussions of the Union.”

In addition to the foregoing, the stipulation permits the General Counsel to introduce, for any purpose, evidence relating to those allegations of the consolidated complaint specifically enumerated in the stipulation.

B. The Facts

1. Respondent's warnings to Maloney

Patrick Maloney first began working for the Respondent in 1975 and left the Respondent's employ in 1979; thereafter he was again employed in 1984 and continued working for the Respondent until his termination in April 1997. His total tenure with the Respondent was in excess of 16 years. At the time of his discharge, although officially classified as a radiographer, a person who takes X-ray photos of products, he was actually performing the job of a certified film interpreter or reader. This job requires expertise in the reading and interpretation of X-ray film exposures of titanium and other steel parts and products used in the aerospace industry, for the purpose of insuring that the material is not flawed and complies with all specifications.

The Union's initial organizing campaign culminated in an election on July 27 and 28, 1995, among the Respondent's approximately 1800 unit employees. The Union lost this election by a small margin (689 to 763, with 124 challenged ballots). Thereupon, the Union decided to commence a new organizing campaign, obtain a new showing of interest, and file a new representation petition rather than wait for the Board's processes to resolve unfair labor practice charges and election objections arising from the first election. The new petition was filed in May 1996. Thereafter, on October 10 and 11, 1996, another election was held. The Union lost this election by a wide margin (573 to 1127, with 82 challenged ballots). The

results of this election were certified by the Board on April 23, 1997.

The instant case involves issues arising out of the Union's second organizing drive, both prior to and after the second election in October 1996 (the election or the 1996 election). Following this election, the Union filed unfair labor practice charges and election objections,¹ and at times material was petitioning the Board to impose a bargaining order remedy on the Respondent, in lieu of a rerun election, as a result of the alleged egregious nature of the Respondent's unlawful conduct.

Since 1995, throughout the lengthy course of the Union's two organizational campaigns and resulting elections, and continuing thereafter, Maloney was an active union adherent. Prior to the 1996 election Maloney's efforts intensified. As one of the Union's most active adherents, he became totally committed to a union victory. He testified that his involvement was “100 percent” and that he attempted to exercise every legal right that was available to him as a union advocate and organizer. He wore union “Vote Yes” buttons and hats, a 3-inch “Volunteer Organizer” button, and a black armband out of sympathy for an active union adherent who had been terminated; he pasted a “giant” Steelworkers sticker on his car; he distributed leaflets outside the plant and in the lunchroom at break and lunchtime, and posted leaflets on employee bulletin boards as he made the rounds of the Respondent's facilities; and he obtained signatures on numerous union authorization cards, acted as a union observer in the election, and assisted the Union in any other legitimate endeavor.

The extent of Maloney's staunch and open union advocacy is demonstrated by his practice of wearing the Union's initials “USWA” on his shop coat, compliments of the Respondent. Thus, the Respondent furnishes each employee with three shop coats, usually monogrammed or embroidered with the employee's name. Maloney ordered shop coats bearing the letters “USWA,” and began wearing them at work. After wearing them for awhile, his supervisor, Bob James, advised him that the “USWA” logo was impermissible. Maloney argued that since employees are permitted to wear shop coats bearing nicknames rather than their true names, he should either be entitled to select a logo of his own choosing or, if this is not acceptable, other employees should be advised that their shop coats may no longer contain nicknames. Nothing more was said to him regarding this matter, and he continued to wear his “USWA” shop coats on a daily basis until the day of the election, after which he began wearing his own jacket with a USWA button on it.

As background evidence proffered to demonstrate Maloney's temperament, the Respondent emphasizes an incident that occurred away from the Respondent's premises during an anti-union rally on October 9, after the preelection conference that day. Maloney testified that EDGE was a formal employee training program that was initiated by the Respondent to promote team-building and interpersonal relations among the employees. EDGE personnel distributed materials and conducted many employee meetings to this end, and the Respondent's EDGE representative, Supervisor Kent Kingman, had personally told Maloney that EDGE would remain neutral in the election process and that in fact EDGE, in other locations across the

¹ The election objections were ultimately dismissed not on their merits but because of the Union's failure to timely provide the Regional Office with evidence in support of the objections.

country, had set up programs for unions. However, prior to the election this professed neutrality faded and the group engaged in overt antiunion activities. Thus, during their antiunion rally near the Steelworkers office, Maloney contrived to demonstrably exhibit his feelings by taking two EDGE books, throwing them on the ground, and spitting and stomping on them, while telling the EDGE rally participants, a group of supervisors, technicians, and hourly employees, "to tell their union busters to go home."

Maloney testified that about the end of June 1996, prior to the election, an engineering supervisor, Alex Lavery, entered his "booth," *infra*, where he performed his work. Lavery told Maloney that he had attended supervisors meetings regarding the scheduled representation hearing at which bargaining unit issues were to be litigated. Maloney asked if Lavery would "leak" anything to him about the discussions, and Lavery said no. Lavery then picked up a NLRB labor relations booklet that was in the booth, and said, "But if I were you, I'd . . . get to know this thing inside and out . . . and if I were you I wouldn't be caught dead with any of this stuff around."

In September 1996, Maloney had heard rumors that the Respondent was blaming "union folks . . . for dragging their feet" and causing delays in delivering parts to a customer. Maloney wanted to assure the Respondent that the Union had nothing to do with this, and that in fact it was the Respondent that had misrepresented to the customer the time it would take for such parts to be manufactured. Maloney requested a meeting with management about this, and explained the situation during a conversation with Mark Damien. Damien has various titles and responsibilities. He is vice president and general manager of a facility in Redmond, Oregon; vice president of human resources for the structurals division in Oregon; and vice president of manufacturing, engineering of the structurals division in Oregon. There ensued an hour's conversation about the Union. During the course of this conversation, Damien said to Maloney, "I just want you to know . . . anybody that fucks me, I'll get even with them, no matter what it takes, no matter how long it takes." Maloney, apparently believing that this was an ominous reference to his union activity, made a note of Damien's statement.

The Respondent's Portland, Oregon facility comprises a large multibuilding campus, and includes several satellite buildings located some miles distant from the main campus. On October 2, 1996, Maloney was asked by his leadman, Bruce Friswald, to go down to the satellites and pick up some cassettes: light-tight envelopes for protecting film. Maloney, wearing his USWA shop coat as he always did, drove to the satellites in his own car, a round-trip distance of over 3 miles. Maloney had previously worked in the satellite buildings and was acquainted with many of the employees who worked there. Upon entering one of the buildings he happened to encounter several acquaintances and he shook their hand and/or said hello and engaged in small talk. When he went into an adjacent area and greeted several employees, Supervisor Suzanne Whittington, who was in the area, said, "What the hell are you doing down here?" He explained, and there ensued a "kind of a nice, jovial conversation," and then Whittington said, "Well, Maloney, you better just get the hell out of here." There was some cross-banter about whether Maloney had to just get out of there or get "the hell" out of there, and Maloney gathered up the cassettes and headed out of the building. At the time he did not consider Whittington's remarks to be the directive of a supervi-

sor, as he was friendly with Whittington and it was a rather convivial, nonthreatening exchange.²

As Maloney was exiting the building he encountered another supervisor, Steve Fisher. Fisher asked him how he was doing and what was going on, and Maloney pointed to his union button and "USWA" shop coat and replied that there was really nothing else happening in his life. They engaged in conversation about union matters, and another employee, Bill Jacobson, happened to see them. Maloney shook Jacobson's hand. Supervisor Whittington observed this and said, "Maloney, I thought I told you to get out of here." Maloney said, "Okay. I'm going." Then he asked Fisher whether it was okay for him to go next door and say hello to the guys. Fisher said, "Sure, Pat, you know you always got a home here."

Maloney then walked across the street to another building and entered the booth of another worker, Alvin Haines, to say hello. At this point Scott Trexler³ looked in the room and said, "You guys aren't talking about the union, are you?" Maloney said, "Well, you know, what if we are." Trexler said, "Well, you can't do that," and Maloney retorted that if employees could talk about basketball or boxing they could talk about the Union. Trexler left. Maloney then told Haines that he had to leave, and Haines said that he wanted a couple of people to see Maloney's shop coat. Maloney and Haines left the booth and engaged in brief conversations with two or three workers. One of them said, "Well, look, he's the poster boy for the Steelworkers," and someone had a camera and took Maloney's picture. Then Maloney walked back across the street, picked up the cassettes from where he had left them, got in his car, and returned to his booth at the main facility. Maloney testified that he had spent about 10 minutes at the first building and about 10 to 15 minutes at the second building, and that he had not distributed any kind of union literature during his visits with the employees. On his return he reported to his leadman, Friswald, that he had returned with the cassettes. Friswald did not say anything to him about the length of time he had been gone.

Maloney testified that prior to 1995 and even between the 1995 and 1996 elections it had been a common occurrence for him to visit the satellite facilities for work-related purposes and, during the course of his visits, to speak with his former colleagues about everyday matters. Maloney testified as follows:

The satellites—the whole concept of the satellites was to be a little bit more laid back, family-oriented kind . . . of a place. And it was very common to . . . if you were coming into somebody else's work area, you'd come in and say, "Hello" and identify yourself. And . . . these are folks you . . . may have worked with in the past, and have an opportunity to get caught up a little bit on what was going on.

The following day, October 3, 1996, during his lunchbreak, Maloney was walking through his building and encountered an employee, Larry Kelly, in the hallway. Kelly asked him whether he thought the Union would prevail in the election. At this point Supervisor Ross Linehart stopped and asked Maloney if he was campaigning again. Maloney said no, that he was trying to follow the rules very carefully, and Linehart asked, "Well, what about yesterday?" and walked off in a huff. Maloney became concerned about this remark and immediately

² The testimony of Whittington, *infra*, corroborates Maloney's characterization of the conversation as friendly banter.

³ Maloney did not know whether or not Trexler was considered to be a supervisor.

went back into his work area, told his supervisor, Bob James, about his encounter with Linehart, and asked James what was going on. James said that he would find out. A short time later James summoned Maloney to the human resources (HR) office to speak with Area Manager Sue Schuster and HR Representative Kim Schwanz.

During this meeting Maloney was asked why he had been out of his work station the day before. He was told that they had received reports of him being disruptive in the workplace, and that they were investigating it. Further, they said that he should consider this inquiry to constitute a verbal warning for wandering and being disruptive in the workplace.

Maloney intensified his prounion efforts during the days immediately preceding the election. On October 7, 1996, Maloney received approval from his leadman, Larry Cody, to take an hour of vacation on October 7, 8, and 9. He told Cody he would probably use the vacation time to extend his lunchbreak on October 7 and 8, and to attend the preelection meeting on October 9. He left work an hour early on October 7, 1996, to hand out leaflets on the driveway.

On the following day, October 8, 1996, he took an extra hour for his lunchbreak and made the rounds around the facility talking with employees he happened to encounter along the route. As he approached the lunchroom he observed that Area Manager Schuster was not far behind him. He entered the lunchroom, walked out, headed down the hallway and, apparently not finding anyone to speak with, then proceeded back into the lunchroom and began speaking with Colin McCann, who was on his break. After speaking with McCann in the lunchroom for a couple of minutes the two of them began walking out of the lunchroom and continued their conversation in the hallway. They talked for several more minutes near the door of McCann's work area (the wax department) when Area Manager Schuster approached and asked Maloney whether he was on break. He said yes, and as he was walking away Schuster said that she had a big problem with Maloney remaining in the facility while he was technically on "vacation." Maloney stated that he believed this was permissible, and asked what he had done wrong. Schuster again stated that she had a big problem with his remaining on the premises during vacation time.

Shortly thereafter, while Maloney was sitting and talking with a group of people in the lunchroom, Supervisor Bob James and Area Manager Schuster approached him and directed him to accompany them to HR. They entered the HR office and Maloney was told to "wait right here." Maloney stood there, some 8 or 10 feet inside the doorway, as people entered and left the room and as James or Schuster walked in and out. Finally, after standing there for "about an hour," Maloney said that he had to go to the bathroom. James followed him into the bathroom and waited outside his stall for about 10 minutes, after which James accompanied Maloney out of the restroom where Schuster was standing. The three of them then again entered HR and after a short wait Maloney was told to come into the office and sit down.⁴

Those present in the office were Maloney, James, Schuster, and Schwanz. Maloney testified that he just sat and listened while the three, intermittently, started and stopped speaking

with incomplete sentences in a disorganized fashion, apparently attempting to figure out whether or not Maloney was entitled to remain on the premises during his vacation time for the purpose of extending his lunchbreak so that he could talk to workers about the Union. Finally, one of them said to Maloney that he had been observed speaking to Colin McCann in the wax area. Maloney replied that he was not in the wax area with McCann, but rather that he was in the hallway outside the door to the wax area when he was speaking with McCann. On hearing this they conceded that he had been observed with McCann outside the door to the wax area. Maloney then explained that the conversation had started in the lunchroom, and that he had walked with McCann to his work station; and he asked them at what point he should have ceased the conversation. They did not respond. Then he asked if he was being denied access to the premises while he was on vacation. They answered, "Potentially, yes." Maloney said that it was important for him to know whether he could use vacation time to attend the preelection conference the following day. They replied that they were just not sure at that time. Then they gave Maloney the following written warning dated October 8, 1996:

On October 3, 1996, Patrick Maloney was verbally warned by Robert James, Susan Schuster, and Kim Schwanz to follow company policy when assigned tasks and to specifically to [sic] not campaign on company work time or in company work areas. We are investigating your continued violation of company policies and the law and will report our findings as soon as possible.

In the mean time, you are given a direct order not to campaign on company time or in any company work area. Violation of this order will result in termination of your employment with PCC.

The document was signed by Robert James, supervisor, and Kim Schwanz, human resources. Maloney was asked to sign the warning, and did so, adding his postscript, "I did not do this." Maloney told them that it was really unfair that they were harassing him because of his efforts on behalf of the Union.

The following morning, October 9, 1996, Supervisor James, who was waiting for Maloney at the timeclock when he arrived at work, again instructed him to go to HR. There he was told by James and Schwanz that he would be permitted to use vacation time while he remained on the Respondent's property, and that he would not be prevented from using vacation time to attend the preelection conference. Maloney told Schwanz that he believed he was being harassed, and Schwanz replied, according to Maloney, "So what? You've harassed people, and your people have harassed people. And we have dozens of complaints about you." Maloney asked him to specify the nature of these complaints, and Schwanz simply replied, "Well, in due time, it'll . . . all come forth in due time."

On October 21, 1996, Maloney filed an harassment complaint with HR, alleging that, "I was discriminated against for my union activity. I was harassed on several occasions, i.e. stopped in the hall and questioned, removed from the lunch room during my regular break, written up for violating the law, followed into the rest room." Attached to his HR complaint form was a lengthy four page handwritten document detailing the incidents of the alleged harassment, with names, dates, times, and places clearly specified. Further, Maloney testified that prior to the election the desk of Supervisor James was

⁴ During this period of time while Maloney was detained in HR there was a mandatory meeting, conducted by Mark Donegan the Respondent's executive vice president, in Maloney's work area; as a result of the instant scenario, Maloney was unable to attend the meeting.

moved to within 15 or 20 feet of his booth so that James could keep a very close eye on him. Also, Maloney testified that he believes he had been followed in and out of the restroom on various occasions by Tim Voegele, another supervisor.

As noted above, the election was held on October 10 and 11, 1996. Maloney testified that as a result of the Union's loss he was "devastated" and "grieving" and "as disappointed as a person could be." Following the election the Union filed unfair labor practice charges and election objections. Further, the Union requested that the Regional Office seek a bargaining order remedy predicated on the Union's authorization card majority status and the severity of the Respondent's unfair labor practices. The Respondent and the antiunion forces among the Respondent's employees sought to counter the Union's efforts in this regard by mounting a campaign to solicit employees to request the return of their union authorization cards. Thus, the election did not put an end to the strong feelings harbored by both sides.

On January 8, 1997, some 3 months after the election, two employees, Terrie Trexler⁵ and Ron King, had set up a table in the lunchroom for the purpose of soliciting employees to request the return of their union authorization cards so that the Union would no longer have a card majority. Several large laminated posters, approximately 2-square feet, attached to the table, contained information about the matter. Maloney, who was on his break, went over to the table to take a closer look, and Trexler asked him if he wanted to sign a petition for the return of his card. Maloney replied that he hoped the Union utilized every means available to accomplish its objective. Trexler said, "Well, yeah, but Pat, we beat you two to one," and Maloney replied that it was his position that the company had poisoned the election. At that point, according to Maloney, the following occurred:

Ron King said, "Oh, get real, Pat," . . . and I turned to Ron and I said . . . "Get real? That's coming from a guy . . . that told me he was neutral, that he . . . wasn't for the company and wasn't for the union . . . that you thought the company was fucked, and you thought the union was fucked . . . that's coming from you?" And then I said, "Is that what you said . . . Ron, isn't that what you said?" And at any . . . rate, Ron didn't say anything, and Terri said, "Well, everybody's got to take a position." And I said . . . "yes they do." And so she said, "Is there anything else we can do for you?" and I said, "No, I'm just looking around to see how many laws are being broken." And . . . I said, "Are . . . you folks going to be here all day?" and she said, "Yes, we will, why?" And I said, "Because . . . I'd really like to get a photograph of this stuff." And, so, at that, I turned and left, and went and got a cup of coffee, and started to head back to my area.

⁵ Trexler, and apparently King, were members of the "Committee To Keep PCC USWA Free." After the election this group distributed flyers, dated October 24, 1996, urging employees to support an anti-union petition that it was circulating in protest of the Union's post election challenges, and further urging them to demonstrate their anti-union solidarity by "blanketing the Structural Division in a sea of Black and White T-shirts and hats on Tuesday, October 29." The flyer is very critical of the "hardcore union organizers" who are "pursuing personal goals" and who are "willing to jeopardize the futures of the vast majority of their co-workers," and contains intracompany departmental phone numbers for interested people to respond to the flyer.

Maloney testified that he was standing in front of the table during the conversation and that King and Trexler were seated behind the table. At the beginning of the conversation his hands were behind his back, and during the course of the conversation his hands were at waist level, one palm on top of the other. Maloney testified that he spoke to King "in a very impassioned way."

One week later, on January 15, 1997, Maloney was summoned to HR. Present were James and Schwanz. They told him that King had filed an harassment complaint against him for the lunchroom incident, and presented him with the following document signed by King:

Statement of Complaint:

I feel that I was harassed, threatened, embarrassed, intimidated and taunted by Pat Maloney on Wednesday, January 08, 1997 at approximately 8:35 a.m. in the Titanium plant lunch room.

Description of Incident:

At approximately 8:35 a.m. I was approached by Pat Maloney while I was sitting at a table in the lunch room. I was sitting with Terrie Trexler collecting signatures on a petition.

He walked up and stood in front of the table with his hands folded in front in an intimidating manner. He read the posters in front of our table. Terrie asked if he had signed a union card and wanted it back or if he knew anyone who would like theirs back.

Still standing with his hands folded in the menacing manner, he replied—something to the effect that no, of course not. Then he stated that he was just seeing what laws we were breaking. I found this statement to imply that he was threatening me with possible legal action for expressing my freedom of speech rights. He then said—I wish I had a picture of this and went on to ask if we were going to be there later in the day. I felt harassed by the implication that he was going to come back and take my picture, thus intimidating me for trying to gather signatures. This was during break and there were probably 40-60 people milling around in the lunchroom but I was focusing on trying to keep my cool and keep Pat from starting any confrontation although I felt that he was really trying to pressure me into an argument. He continued the taunting by saying something to the effect that "Ron, weren't you the one who said you didn't know what side of the fence you were on and you weren't sure where you stood on the union issue." I felt that he was trying to embarrass me in front of my coworkers in the lunchroom and discredit me to Terrie Trexler—my fellow petition committee member. Somewhere in his tirade he asked "Do you know what you are doing?" in a loud voice trying to further embarrass me by causing everyone to stare at me. He was trying to humiliate me in front of everyone.

Adjustment Requested

I was upset about this situation and do not want it to continue to ever happen again. I feel that he should be disciplined for his actions and that I just want to be left alone. I feel that he or one of his fellow union organizers may retaliate against me over this complaint. I do not want to have to look over my shoulder all the time and feel that I may be constantly threatened over this.

Maloney testified that after being given time to read the complaint, he was asked by James and Schwanz to respond to King's allegations. Maloney said that he was unable to do so until he had an opportunity to review the complaint with counsel, and asked to be provided with a copy of the complaint. His request was refused, and Schwanz and James again began questioning him about his version of the matter. Maloney related to them that he did speak with Trexler and King in the lunchroom, but that he did not harass them or hold his hands in a threatening manner, and again said that he was refusing to respond to anything else until he had an opportunity to review the complaint with counsel. He said that he had the right to walk the halls as much as anyone else, and that this was part of the Respondent's continuing harassment against him. He then asked how he could protect himself from allegations of this nature, and Schwanz replied, "Well . . . if I was you, my advice to you is to keep your mouth shut . . . do your job and mind your own business." Maloney was told that "[w]e're warning you not to do" the things alleged in the complaint, and that King's charges were being investigated.⁶

2. Respondent's union animus and conduct proscribed by the Act

Grant Doty worked for the Respondent for nearly 20 years, and left Respondent's employ in April 1998. Doty testified that about a month or so after the election he attended a mandatory meeting conducted by Mark Donegan, the Respondent's executive vice president. Donegan said, according to Doty, "that there was still some people that was still digging after it's [the Union] been voted down, and if they keep it up, he's going to treat it like an act of revenge." Donegan said, "It's over," and that there was "zero tolerance" for any union activity.

Everett Nance, who worked for the Respondent for 13 years, until October 1997, was an openly active union adherent. Nance testified that prior to the election he was followed on three occasions: once by his foreman, Tim Bogley, who followed him to the restroom, stood there and watched him urinate, and then followed him back to his work area; on the second occasion by Chris Brand, who was Bogley's boss, as Nance went to another department on work-related business; and again, apparently by Bogley. During the latter incident, Nance wanted to satisfy himself that he was not just imagining things, and deliberately led Bogley on a "goose chase" by walking a circuitous route around the lunchroom and around a post before proceeding to his destination; Bogley followed close behind.

Nance also testified about a confrontation with Area Manager Schuster, remarking that even when he was in the military he had never experienced anything so bizarre: He had a work-related question to ask an inspector in the area, and as he started to walk past Schuster, "she stuck her arm out, and slammed me in the chest with the flat of her hand and said, 'Where do you think you're going?'" Nance said that he was going to speak with the inspector, and Schuster said, "No, you're not. You're going back to your station and go to work." Then she "grabbed me by the shoulder, and spun me around and shoved me toward

my workstation. This was someone that outweighed me at that point by about 80 pounds . . ."⁷

Nance testified that sometime after the election he attended one of the mandatory monthly departmental meetings during which Respondent's executive vice president, Mark Donegan, thanked everyone for the outcome of the election, and told them that it was time to get back to work and to get down to business. Donegan further said that he appreciated the efforts of those who were asking for their cards back. He had a poster, about 2 feet by 3 feet in size, bearing the warning sign of a slash through a large red circle, and, according to Nance, "stated how he wasn't going to tolerate any activity. He had a zero tolerance policy for union activity, and he felt the people had spoken and he wasn't going to tolerate it anymore." Nance testified that Donegan emphasized the same "zero tolerance" policy at subsequent meetings, using the same warning sign for emphasis.

William "Jake" Jacobson, is a current employee of the Respondent. Jacobson testified that prior to the election he was among the main leaders of the union movement in the plant. He was warned by the leads that he was being watched. On one occasion a swing-shift supervisor, Dan Barley, came in after Jacobson had clocked out but before he had left the premises. Jacobson was talking with another employee, and Barley told him that he shouldn't be there. Jacobson said that company policy provided that employees were permitted to remain on the premises 15 minutes after work. Barley told him that he had better be out of there on time. On another occasion a supervisor, Ron Carnes, approached him as he was talking with another employee and said, "You aren't Jake, aren't you?" Jacobson said yes, and Carnes said, "We aren't talking about the union, are we?" Jacobson said that as a matter of fact they were talking about the Union and that they were both clocked out for lunch. Carnes turned around and left. On another occasion, Executive Vice President Donegan approached him and asked how he was doing. Then he asked where his workstation was and Jacobson replied that he was standing near one of the X-ray machines that he was responsible for. Donegan asked him where he read X-rays and told him, "get in your booth and stay there." As Jacobson was leaving to go to his booth, he observed that Donegan stopped and spoke to another employee who was on medical leave and was not supposed to be in the building at the time; Donegan introduced him to someone saying, "he's one of the good guys." On another occasion Susan Schuster followed him all the way to the bathroom, and when he came out she was in a position where she could observe the entrance to the bathroom.

Jacobson testified that on December 11, 1996, after the election, Donegan conducted a mandatory employee meeting and suggested that there might be another union drive in May or June of that year, and said that "he had absolutely zero tolerance for card signing" and went on to say that he did not want anyone to sign anything.

Jacobson testified that it was common for employees to socialize while on the job, and that there had never been any restrictions placed on employees' conversations until they were told by supervisors prior to the election that conversations about union activity on company time was "taboo."

⁶ Neither Maloney's testimony regarding this meeting or his notes which he made immediately after the meeting indicate that Maloney was questioned about an alleged harassing comment he made to King in the hallway on January 10, 1997, *infra*.

⁷ The testimony of employee Grant Doty, who observed the incident, corroborates the testimony of Nance.

Jacobson further testified that it was customary for employees from other facilities who may be on various work-related errands to stop by and socialize, and that supervisors would not interrupt and instruct the visiting employee to leave the premises or the work area. Indeed, he has been present when supervisors Suzanne Whittington and Dianna Reedy would participate in such discussions about general topics of mutual interest with employees on errands from other facilities together with other coworkers.

Donald Thurston has worked for the Respondent for 9 years and is a current employee. Thurston testified that shortly before the election he had a conversation with Mark Damien. The two happened to pass in the hallway and Damien asked Thurston what he was doing. Thurston said that he had just finished helping another employee with something and Damien, who had started to walk away, turned around and said, "[T]hat I had screwed him [in] the past, and that if he ever got the opportunity, he'd fire me." Then he walked out the door. Thurston testified that he had talked with Damien about fishing and other matters in the past, and that the only thing Damien could have possibly been referring to was with regard to the testimony Thurston, who was a leadman, had given on behalf of the Union in a related representation hearing, either after the first election (a hearing on objections) or a subsequent hearing prior to the second election concerning the issue of whether leads were statutory supervisors. Thurston had testified on one of these occasions that Damien told him that he (Damian) had someone attending off-campus union meetings and reporting back to him, that it would be Damien's word against Thurston's if Thurston repeated this, and that Thurston would lose this credibility conflict.

Mike Goggin has worked for the Respondent for over 32 years and is a current employee. Following the election he attended a mandatory meeting conducted by Donegan. Approximately 100 employees were in attendance. Donegan talked about productivity and other business-related matters. Regarding the election, he said that now that the election was over he wanted to "forgive and forget" but, "if he hears of anymore union activity going on, or continuing, he will consider that a threat, and act accordingly." He said that he would consider further union activity as an "act of revenge," and then he stopped talking, for emphasis, to let this remark sink in, before going on to another subject.

Theresa Martinez is currently employed by the Respondent. Martinez was an active union advocate and wore union buttons and T-shirts at work. Martinez testified that one day, about a month before the election, while making copies of work-related documents during working hours, she happened to be talking with several technicians who had asked her something about the Union. She was approached by Vince Walters, a supervisor, who told her that she was not supposed to be talking about the union except during her lunchbreaks outside of the work area.

Martinez also testified that several days prior to the election she observed an area manager talking to a group of employees about the union during working time. She remarked to the manager that she believed this was contrary to the rules. Shortly thereafter her supervisor, Steve McAndrew, approached her and told her that she was to sit and work at her work station and was not permitted to leave it for any reason, and that she should have one of the acting leads bring her everything she needed to do her work. Prior to this, in the course of her work,

she would customarily leave her immediate work station for work-related purposes, and had never been required to have items brought to her. This confinement to her work station lasted for a total of about 5 days, and ended about 2 days after the election.

Jeff Abernathy worked for the Respondent from December 1979 until March 1998. His supervisor was Doug Cooper. During the week of the election, Cooper approached him and said that Mark Damien had issued a directive that union organizers were to be watched closely and that "any behavior was to be dealt with with disciplinary action." Cooper told Abernathy to, "Watch yourself. I don't want to see you get in trouble." The day before the election Damien was walking through the plant and someone asked him what he was doing in the area, as he was not on the floor very often. Damien replied, "Somebody has got to do the work. Abernathy is spending all of his time campaigning." Then he came over to Abernathy's work station and they engaged in small talk about a union video, distributed several days earlier, in which Abernathy appeared. The following day, the first day of the election, Abernathy was at his work station talking with two other employees about hunting or trucks or something, and Damien approached and said, "You'd better not be organizing. I'd hate to have to fire you."

Colin McCann was employed by the Respondent from July 1984 until October 1997. He was an active union supporter. McCann testified that prior to the election he was talking with Maloney in the lunchroom about, among other things, how things were going with the Union. When it was time for McCann to return to work, Maloney accompanied him out of the lunchroom and they continued their conversation in the hallway near the doorway to McCann's work area. They talked for a short period of time, and McCann returned to work on time. He was never interviewed about this matter by anyone from management.

Chris Webb began working for the Respondent in 1985. Prior to the election Webb had a conversation with his supervisor, Mark Weller. Weller told him that he preferred that Webb didn't talk union on company time. Several weeks later Webb had a similar conversation with Weller, and said that it was his understanding that employees were permitted to talk about any subject, for example sports, family, and other matters of mutual interest, and asked Weller, "What's the difference?" Weller reiterated that he was not to talk about the Union on company time. Webb had a similar conversation with Frank Mello, an area manager and Weller's immediate supervisor. Mello said that he "preferred" that the employees didn't talk union on company time, but he did not state that such conversations were forbidden. On the day before the election Mello told him that the "company was really watching the organizers and that I shouldn't be out of my booth talking to people." Shortly thereafter, when Webb left his booth to pick up work in another area, Mello followed him and stood around, and even engaged in the conversation as Webb was talking about work-related matters with others. And thereafter he came by Webb's booth on several occasions, looked in, and said, "Good. You're here."

John McClelland is currently a part-time employee of the Respondent and was formerly a full-time employee. McClelland testified that employees would come to his area from other areas on regular occasions, for work-related reasons, and would remain to chat for awhile, and that this activity was not prohibited. Similarly, McClelland would engage in such conversa-

conversations with others when his work took him to other areas of the plant.

Fred Wyatt, who worked for the Respondent from 1973 until May 18, 1998, testified that prior to the election Area Manager Schuster summoned him to Supervisor Bob James' office and told Wyatt that if he was caught doing union business on company time he could be fired. About 4 to 8 weeks prior to the election James' office was moved less than 40 feet from Wyatt's booth, a vantage point from which James would be able to see who entered and exited the booth.

Mo Fitzpatrick worked for the Respondent from August 1978 until October 1997. She was an active union adherent. Her job entailed going to a lot of different areas and facilities, as she was responsible for transporting parts from one location to another during the production and testing process. Some of the parts were large, bulky, and heavy, and she would have to push them on rolling fixtures or dollies designed for that purpose. It was much more convenient to proceed through certain work areas in order to move the parts to their destination, rather than to take a much longer, circuitous route around the facility. Prior to the election the manager of one area told her that she could no longer bring parts through that area. Fitzpatrick complained to her supervisor, stating that there was no way she could drag those parts all the way around the plant. Her supervisor said that he would find out, and the next day came back to her and reported that he had approached the other area supervisor, who happened to be speaking with one of the Respondent's "union consultants" at the time, and inquired about the problem; the consultant said, "She's a union organizer, isn't she?"

Fitzpatrick testified that after the election, at a monthly meeting, Donegan said that there would be "zero tolerance" for union activity, and that he no longer wanted to see any union literature on the bulletin boards.

Fitzpatrick testified that she was one of the union organizers and that Maloney was considered to be the chief organizer and the leader of the group. When the other organizers were "running scared" as a result of the Respondent's tactics, and were afraid to post literature on the bulletin boards or engage in other permissible activities, Maloney would ease their concerns and urge them to "keep [their] eye on the prize." Fitzpatrick testified that the day after Maloney was terminated, as she was going to her work area, she overheard Cheryl Green saying to Patty Dolan,⁸ a member of the antiunion committee, "We got him. We got him. We got . . . Pat Maloney."

Suzanne Whittington was called as a witness by the General Counsel. She was employed by the Respondent from October 1989 through April 1997. At the time she left the Respondent's employ she was a production supervisor, and reported to Area Manager Sue Schuster. Whittington testified that during the 2 weeks prior to the election there was a "pretty heightened sensitivity" about groups of people gathering in the workplace, and every supervisor was instructed to disburse any small gathering of employees, whether pronion or not, if their conversation was not work related. Prior to any union organizing it was common to see groups of people gathering and chitchatting about nonwork-related things, and then going on about their

work. Whittington testified that the Respondent kept track of the identity of pronion, antiunion, and undecided workers and there was a room designated as the "war room" where such information was gathered.

Whittington testified that she saw Maloney at her satellite facility and approached him and asked him what the hell he was doing there. He said that he was picking up cassettes, and Whittington told him, "somewhat jokingly," to "get the hell out of there." Whittington testified that she liked Maloney and found him pleasant to deal with and, knowing that Maloney was one of the union organizers, felt that it would be "in his best interests to go from point A to point B, and not make any stops in between." Then Whittington came across Steve Fisher, a production supervisor in another facility who is the same level of supervision as Whittington, and Fisher said that he had stopped and talked with Maloney. After Maloney left, she reported his presence to Sue Schuster, her immediate supervisor, apparently because supervisors were then required to report employees who were out of their assigned work areas. Then that same afternoon she received a call from Kim Schwanz who asked her what her conversation was with Maloney.

Whittington testified that it was common for employees from other facilities to come to her facility, or for employees from her facility to go to other facilities, for work-related reasons, and that it was a common and accepted practice that such employees stop and chat with friends or former coworkers about any topic; however, at times material, union-related discussions were not permissible. She is not aware of any person other than Maloney who was disciplined for talking about union matters.

Whittington testified that she took maternity leave after the election, from October 22, 1996, through the end of January 1997, and suggested that John McClelland, a unit employee who was being given "management development" training, take her place during her absence. However, as an acting supervisor he would be required to participate in ongoing activities and meetings dealing with union topics which were continuing after the election; since McClelland was considered to be pronion he was not given the job.

Finally, Cheryl Green testified that, "[w]hile you're working you can chit-chat back and forth about all kinds of things as long as you're still doing your job."

3. Threats; supervisory status of Bob Runyan

Grant Doty worked for the Respondent for nearly 20 years, from October 1979 until April 1998. Doty testified that prior to the election he had been talking with several employees, including Maloney, outside the plant, during a lunchtime barbecue furnished by the Respondent. After the employees left, Area Manager Bob Runyan approached him and asked if he, Maloney, and the others had been talking about union stuff. Doty said yes. Then Runyan told him, "that I should watch what I talk about, and who I hang with, because all levels of management was watching Pat [Maloney] at this time, and they were going to get Pat at no expense. He made a remark that they were going to cut his balls off."

Doty testified that he had developed a friendship with Runyan over the years, and that prior to the election Runyan, who had formerly been Doty's area manager, with the authority to fire employees, had explained to Doty that he retained the title and pay scale of an area manager even though he was no longer assigned to supervise any specific area; rather, he circulated or "drifted" around the plant in an "assisting" capacity. Doty

⁸ Dolan's name is listed as a committee member on the aforementioned October 24, 1996 bulletin disseminated by the "Committee to Keep PCC USWA Free," which urges, *inter alia*, that employees sign the petition to get their union authorization cards back from the Union.

observed that Runyan would circulate with other area managers and supervisors during “walk-throughs” on a regular basis at the end of the shift, and that this group of managers and supervisors would apparently oversee and chart the progress or flow of parts through the various stages of the X-ray process.

On another occasion Runyan was in Doty’s area and asked him how he was going to vote in the election. Doty had not identified himself with the Union by wearing any of the union buttons or hats or other paraphernalia that employees wore, and Doty replied that he had not yet decided what he was going to do.

Everett Nance worked for the Respondent from 1984 until early October 1997. He worked in the vicinity of Maloney. Nance testified that Bob Runyan occupied an “area manager” position, higher in the managerial hierarchy than Nance’s area manager, Sue Schuster, but that at the time in question Runyan had no particular assigned area that he was managing. Nance testified that prior to the election, Runyan would periodically stop by his work station and tell Nance, who was openly pro-union and involved in organizing activities, that “it would be a shame for someone like me to jeopardize my job due to union activities.” Nance replied that he would vote for the Union even if he was the only employee to do so, and that he didn’t appreciate Runyan’s threats. On other occasions Runyan told Nance, “You want to be careful. They’re keeping an eye on you”; and “It would be a shame to see someone with your seniority jeopardize their position from union activity.”

Supervisor Suzanne Whittington, called as a witness by the General Counsel, testified that Bob Runyan was a coordinator or “cycle-time reduction team leader” who was heading up some of the process improvements and was given other special assignments. According to Whittington, Runyan had formerly been a supervisor in charge of a department and was still considered “a part of the supervisory group and above.” Production supervisors understood that Runyan continued to have the authority to “direct” employees in various areas of the facility, even though Runyan was not the immediate supervisor of such employees.

Regarding Bob Runyan, Schwanz testified that Runyan has not occupied the position of manager or supervisor since about January 1996, as he was deficient in certain “people skills” and was therefore removed from the position of managing or supervising production area employees. Currently, according to Schwanz, Runyan is a “program manager working training issues,” and this is the same position he occupied at the time of the election in October 1996.

On September 19, 1996, less than a month prior to the election, the Respondent published and posted on its bulletin boards a document entitled, “Precision Castparts Corp. Supervisor List—Structurals Division.” It lists 171 supervisors and managers, including Donegan, Damien, and Schwanz. Bob Runyan’s name is also on the list. Runyan was not called as a witness in this proceeding.

4. Maloney’s relationship with Cheryl Green; related complaints; Maloney’s discharge

The reading booth where Maloney read and interpreted X-ray film was part of a small, confined, windowless, cubicle-like room with a door that always remained unlocked. The room was divided by a wall that separated the interior space into two separate booths or areas, with plastic opaque curtains hanging from the doorway between the two booths, and with an X-ray

reading machine (viewer) in each area. On his shift, Maloney occupied one area and a coworker, Fred Wyatt, occupied the area adjacent to the door to the outside hallway. As Wyatt was also known to be a staunch union supporter, their booths were commonly referred to as the “union annex” or “union headquarters.” These booths were also used by other X-ray readers on other shifts.⁹

On Wyatt’s side of the curtain was a large chalkboard that Wyatt had salvaged from the refuse dumpster and had brought with him from his previous work area. There were no restrictions on the use of the chalkboard and it was available for personal use as a “notepad” by anyone who wanted to use it; and it was used by Maloney and Wyatt for union related as well as other purposes. On Maloney’s side of the room was a cork board on which Maloney had posted union-related material; he also had, in plain view, a box of union literature, NLRB pamphlets, and other related materials.

Maloney testified that on January 21, 1997, Damien, Schwanz, and James entered Wyatt’s side of the room, the side nearest the door, and began talking among themselves. It was very unusual for Damien or Schwanz to be in Maloney’s area, and Maloney, who was working on the other side of the booth, separated from them by the curtain, announced his presence to them as a courtesy as he did not want it to appear that he was eavesdropping on their business. Damien told Maloney that he liked the language of the “Steelworker Code of Ethics,” an original idealistic creed calling for employees to put forth their best efforts and maintain high work ethics, that Maloney had composed and had written on the chalkboard. Damien told Maloney that although Maloney had the right to place messages on the chalkboard, anyone else had the right to erase what he had written. James asked Maloney to remove a small “Go Steelworkers” sticker, perhaps 1 inch by 3 inches in size, from a small metal “mask” used to block light from the reading machine, stating that the mask was company property and union material should not be pasted to it. Maloney, who had placed this sticker on his mask on a daily basis since the inception of the organizing drive and had never before been told to remove it, complied with James’ direction.

Then Damien reminded Maloney not to harass anybody. Maloney, having been given such warnings many times by Schwanz and others, responded that he still was trying to understand what that meant, and “was just trying to survive.” Damien went on to say, according to Maloney, that after the election “a lot of folks had . . . come back to camp, and . . . nobody expected me to come back to camp, but that I’d taken this thing to a level way beyond [what] anybody expected.” Damien then told Maloney: “You . . . better watch out, you better not make any mistakes, because there’s nobody in this corporation that’s going to lend a hand to help you.”¹⁰

Maloney testified that he was “petrified” as a result of what he perceived as a concerted effort to get rid of him, and “pretty much figured that anything that I said or did was going to end up getting me . . . fired.” He discontinued his usual practice of

⁹ According to Maloney, there were a total of some five such booths in the same general area, and some eight additional reading booths in other departments or areas.

¹⁰ Damien denied that he made this statement to Maloney and also denied that he made any of the threatening statements attributed to him by other witnesses, *supra*. I do not credit Damien, and find that Damien did, in fact, make such threatening and unlawful statements to both current and former employees, including Jacobson and Thurston.

taking his breaks and lunch in the lunchroom, except, on occasion, when he would be escorted by friends who would be able to attest to his conduct; he would even notify coworkers when he was going to the bathroom so that supervision could not question his whereabouts. Basically, until his discharge, he was reclusive and remained in his booth the entire workday.

Maloney testified that in February 1997, he attended one of the periodic "Coffee Talk" meetings conducted by the Respondent. This one was conducted by Donegan. Donegan, in addition to talking about production related matters, told the group that the Respondent was adopting a "zero tolerance" for union activity, and explained that he simply meant that no union activity would be tolerated. However, while absolutely prohibiting any union activity, he also urged the employees to contact the NLRB and tell them that the Union had misrepresented the nature of the authorization cards they had signed.¹¹

In the course of his duties, Maloney would agree to train X-ray readers, for which he would receive "trainer's pay" in addition to his usual wages. This was a common occurrence, and he had trained many trainees in the past. Four weeks prior to the election he had accepted the assignment to train Cheryl Green, and said that he would accept her for 30 days, after which she would be assigned to some other reader for continued training. This was customary, as it was necessary for a trainee to work with a number of different readers in succession in order to observe their personal techniques and acquire a thorough knowledge of the job.

In accepting the assignment of Green's training, Maloney made it clear that he would not evaluate Green.¹² There were several reasons for this: first, such training takes as much as several years and an evaluation after only a month seemed to be premature; further, Maloney believed that if he had given Green a negative evaluation, she would have complained and management would have somehow used this adversely against him, as he felt he was being targeted for discharge because of his union activity. Thus, Green was not an unknown quantity, and had been under Wyatt's tutelage for a week or so immediately prior to her assignment to Maloney. In fact, a desk for Green had been placed on Maloney's side of the curtains due to space limitations even prior to the time Maloney became responsible for Green's training. Wyatt discontinued Green's training because of certain "conflicts" that developed, and Green was agreeable to the transfer as she was not comfortable working with Wyatt.¹³ Accordingly, Maloney was wary of getting into a training relationship with someone who could potentially cause him further problems.

Maloney testified that although on an earlier date Green had participated in a pronoun march, as the election approached he suspected that Green was not supportive of the Union. Thus, she told him during a conversation shortly before the election

that her husband, who also worked for the Respondent, had negative feelings about the Union. Further, during this same conversation, Maloney related to her that he provided the sole income for his family of five and was in the top 10 percent of the Respondent's hourly paid employees, and yet his income still qualified him for government assistance. Green expressed surprise at this and said that it wasn't right and that she was going to talk to somebody about this matter. Thereupon, she walked out of the room and upon returning said that she had talked to someone in HR about the issue. Maloney figured that if Green was looking for assistance from the Respondent rather than the Union to resolve such problems, then she probably was not a union supporter.

At this time Green was not yet using a wheelchair.¹⁴ Maloney knew that Green, a long-time employee, had suffered from physical problems, and that such problems were impeding her ability to perform certain tasks. But it was not until later that she told him about her specific illness: progressive rheumatoid arthritis. As a result of this she had missed a number of days of work. Maloney's training of Green did not require any physical activity on her part, and involved only the reading of x-rays and other written materials.

A day or so prior to the election, Maloney told Green that she had pretty much completed the written 4-week training schedule he had prepared for her, and that she would be going on to the next reader for continued training. The election was held on a Thursday and Friday, October 10 and 11, 1996. Maloney testified that the following Monday, October 14, 1996, Green came to work and told Maloney to cheer up. She told him that she hadn't decided how she was going to vote until the night before the election and that she was going to give the Respondent one more chance to make things right. She continued talking about what she was going to do on behalf of the Union during the next campaign, if necessary, at which point Maloney, who was very dejected, tried to just get back to work. Green said, "Well, just get over it. You lost, we won. Get over it."

After that time Green was not able to come to work on a routine basis, and Maloney didn't see her very often. In fact, after October 14, she did not return to work until more than a month later, on about November 20, just before Thanksgiving. Upon her return she was placed on the swing shift under the tutelage of Mike McCusker, another reader. She had a flexible schedule that permitted her to work the hours that she wanted. At some point after the election Green offered Maloney a pamphlet about rheumatoid arthritis, with a picture of someone in a wheelchair on the cover. They had some discussion, and Maloney asked Green if she thought she was going to end up in a wheelchair. Green said yes, and Maloney sympathetically stated something to the effect that she "must be a pretty good faker" to be functioning as she was then functioning with the knowledge that her condition would continue to degenerate. Contrary to what Green apparently alleged some months later, Maloney was not intimating that Green was faking her disability.

¹¹ As set forth above, other witnesses testified similarly.

¹² It appears from the record that Maloney had not provided written evaluations for other trainees.

¹³ Wyatt testified that he had only worked with Green for 5 days in September 1996, and that Green was not willing to follow his instructions. One day he was asked by the department clerk, Kim Hefner, what he had said to Green, because Green "was in here crying and just blubbering and just carrying on that . . . you were upset with her." Wyatt said that he had not been upset with her. Then he told Hefner that he was no longer willing to train Green because he didn't need any trouble, and that Hefner would have to find someone else to train her; Maloney then undertook the training of Green.

¹⁴ Apparently Green's condition was such that a wheelchair would be later be required for "excessive" distances when she had to exert herself for periods of time, but at all times material she was able to stand, reach, and perform her duties, and even walk short distances. Thus, even at the time Green testified herein, on June 4, 1998, more than a year after the events in question, she is able to walk as much as a block or so, to push a grocery cart in the grocery store, and to get around without a wheelchair under certain other circumstances.

ity, and Green, according to Maloney, clearly understood his sincere concern at the time. Maloney testified that he absolutely believed that Green was a very sick person.

As noted, on Green's return from her extended leave, Maloney and Green no longer worked together. Maloney used the booth during the day shift, and Green used it on the swing shift after Maloney departed for the day. Their encounters at the facility were mainly limited to sporadic occasions when they may have been clocking out or in, respectively, at 2:30 p.m. at the end of the day shift/beginning of the swing shift. Because of Green's disability and the fact that she was sometimes in a wheelchair, beginning in about February 1997, certain changes were made to the booth and the equipment to accommodate her. Thus, for example, a newer viewer was removed and an older, discontinued, less efficient model was substituted, as the older version had hand controls that could more easily accommodate Green's condition. At first this viewer was placed on Maloney's desk because Green's desk had been removed from the room; later, Maloney's desk was removed and was replaced with Green's former desk as it was more comfortable for her but less accommodating for Maloney's height. Thus, Maloney was required to work in a reconfigured booth with a less desirable viewer and less desirable desk, that both he and Green utilized during their sequential shifts.

Maloney, having worked alone on his side of the room for about a year, and having furnished his side of the curtain with family photos and other personal items, was not consulted regarding the aforementioned changes that were being made, and would find his work space rearranged when he arrived at work. Thus, his large oil painting was partially blocked by the moving of his desk from one wall to the other, and his photos were now behind him rather than where he could see them while he was working; and Green had utilized the space where he would have liked to relocate his photos, designating most of it for herself and pasting yellow sticky notes to the wall for "Pat's pictures" or "Pat's kids pictures." Maloney did recall telling Green on one occasion something to the effect that, "this is my space, and it's kind of being disrupted." Maloney testified that his confined workspace, which really was no more than a large cubicle, had been "interrupted" and turned around "180 degrees," without his input, and acknowledged that this was a source of irritation with him. He did not necessarily blame Green for this, but believed that whoever was responsible for making the changes should have accorded him the courtesy of at least consulting him before the changes were made.

Green testified that initially her relationship with Maloney was "wonderful. It was wonderful. He was a great trainer." But this changed at some point shortly before or immediately after the election, apparently before her transfer to the swing shift, when her relationship with Maloney became strained due to the fact that Maloney learned that she had decided to vote against the Union. Thus, while Maloney did not direct any comments specifically at Green, he and Wyatt, during the course of the day, would sometimes make sarcastic or negative comments about those employees, in general, who did not have the vision to understand how badly the Union was needed and did not appreciate the efforts of Maloney and Wyatt and others who had had put themselves in jeopardy by supporting the Union. Green believed that, as the election was history, such conversations were inappropriate; she also believed that such references were obtusely directed at her as she had declared that she voted against the Union.

Indeed, Green stated that she initiated the transfer to the swing shift to distance herself from such discussions and that thereafter she never again had a "full conversation" with Maloney. Thus, according to Green, she went to Supervisor Robert James and told him that working with Maloney was "unbearable" . . . that I felt that Pat was being very hostile, he was angry with me, and I felt that he was borderline harassing me, and I—just needed to go somewhere else. I needed to get away from that." Green was then transferred to the swing shift where she was placed under the tutelage of Jim McCusker, whom she described as "wonderful, a very wonderful, gentle man, good trainer, and I enjoyed it very much."¹⁵

Regarding Maloney's general demeanor, Green testified:

[Maloney] had this way of standing in front of you and it totally—it feels like he has his arms against the wall and you're trapped. He does not touch you. His arms are not against—or his hands aren't against the wall, but it feels that way. He has this way of wrapping around you, and that's what he did.

Green testified that after her transfer to the swing shift she had only infrequent communications with Maloney, and, apparently during this period of time, certain of these communications took the form of concern by Maloney that his booth and work environment was being disrupted by the changes described above, designed to accommodate Green and her wheelchair. Green interpreted Maloney's comments as being directed at her, and believed that he was not being sufficiently deferential to her physical handicap; and she ascribed Maloney's comments to perceived negative feelings toward her because of her vote against the Union. However, Green did not complain to any representative of the Respondent about Maloney's conduct at this point in time.

Indeed, as noted, it was not until some five months after the election that Green voiced any complaints to Respondent's supervisors or management personnel regarding her relationship with Maloney. Such matters are discussed below.

The incident that precipitated the chain of events that directly resulted in Maloney's discharge occurred on March 6, 1997. Green had arrived at work as Maloney was leaving work. Green asked him to remove a large casting that was setting on a wheeled platform because it was in her way and prevented her from conveniently maneuvering her wheelchair within the confined space. Her polite request, according to Green, resulted in a caustic reply from Maloney. Thus, according to Green's log of the incident,¹⁶ the following occurred:

Thurs. 3/6/97—Came in at beginning of shift to find a 8395 [metal casting] on a square table in the reading booth. It took up too much space and I was not able to maneuver [sic] in the booth. I waited for Pat Maloney to get back from a dayshift meeting thinking he just hadn't had time to move it yet. Af-

¹⁵ I do not credit Green's testimony in this regard. The record clearly establishes that in fact Green was transferred to the swing shift for continued training, because Wyatt refused to train her any longer and her training with Maloney had been completed; it had been initially understood that she would remain under the tutelage of Maloney for only one month. The Respondent has presented no evidence corroborating Green's testimony that she voiced any complaints about Maloney to Supervisor James or anyone else until some 6 months later, on about May 13, 1997.

¹⁶ Because the incident caused Green a great deal of consternation, her husband suggested that evening that she begin keeping a log of work-related problems.

ter he returned I saw he was getting ready to go home so I asked him if he could please take the part out of the booth for me. He immediately got a angry attitude and replied, "I thought that's why we took the desk out." I tried to explain that I can't have a part in the booth until the wall is removed. He was too mad to listen. He removed the part with a very hostile attitude.

Green, testifying regarding the incident and amplifying upon the entry in her log, stated that when she asked Maloney to move the casting he "came unglued" and "started throwing a fit." He said to her, "When are you going to quit making changes? I thought that's why we got the desk out of there."¹⁷ And Maloney angrily began "jerking that [casting] around, and I just felt horrible." Also, Wyatt, who was present in the booth and heard the exchange, exhibited a hostile attitude and removed his large toolbox from Green's side of the booth, sarcastically emphasizing that he, too, would make room for her to maneuver. Green told Wyatt that she preferred that the toolbox be left on her side as she utilized it near her desk as a sort of table to place things on. Then Wyatt returned it.¹⁸

As a result of this episode, Green testified that she became very emotional and had to go to the bathroom and hide because she was crying so hard. Stress exacerbates her physical condition. She "just could not believe that someone would treat another person like that . . . it's so disgusting." Then Ruby, one of the leads on the graveyard shift came in. Green said that she needed to tell someone what was going on and asked if Ruby would talk with her. They talked for quite awhile and Green let her know "not just this but all the things that had been happening," and said, "I can't take it anymore. I go home, and I can't sleep because I'm so busy trying to figure out, why is he treating me this way, and how . . . can I break through . . . and then I get up in the morning and get ready to come to work, and on the way to work I'd be so stressed out because I didn't know what he was going to do to me, or say to me next, and make me feel like a creep." Ruby said that she would talk to Robert James, Maloney's day-shift supervisor, about Green's concerns.

For the following day, Friday, March 7, 1997, Green's log states: "Fred [Wyatt] is keeping his tool box in his booth now. Oh, well. (Talked to [leadpersons] Ralph [George] and Ruby tonight about this)."

On Monday, March 10, 1997, Green arrived at work and found the following sentence on the chalkboard: "What do you want, to play games or make a change?" She believed that the remark was directed at her, and reported the matter to her swing-shift supervisor, Matt, relating to him what had happened previously on March 6. Also, she invited another coworker, Mike Earl,¹⁹ to come and look at the chalkboard. On the following day, March 11, she erased the message and in its place wrote, "Explain who is you?" along with her name and employee number so that Maloney would know who wrote these words.²⁰ She was ill the next day and was absent from work, but when she returned on the following day, March 13,

Earl related to her that he had checked the booth on March 12 and had found the message, "HOO IZ U!" printed on the chalk board; and that in her absence he had brought this to the attention of Matt and showed him the board. When she returned to work on March 13, the chalkboard was blank.

On March 13, 1997, Green filed an harassment complaint against Maloney with HR, and her log entry that day reflects that she had a meeting with Schwanz, James, and Earl, during which she apparently related the entire scenario, as set forth above. In support of her complaint she attached the log she had begun on March 6.²¹

The next entry on her log after March 13 is dated March 26. It states that on March 25, she had complained to her leadman, Ralph George, about certain matters of concern that had been occurring for a while, namely, that "someone" was continuously untying a length of twine that had been tied to the doorknob of the outside door that she used to pull the door shut when she exited in her wheelchair;²² that someone was closing the ceiling air vent in the room and this made the temperature uncomfortable for her; and that her paper towel holder was being moved to a higher peg in the pegboard near her desk, so that she could not readily reach it. George, according to Green's log, said that he would tell Ruby about this so that Ruby could relate Green's concerns to James, Maloney's supervisor; and George further told her that he would begin checking the booth each day at the beginning of her shift to be sure that the string was on the door, that the vent was open, and that her paper towel holder was where she preferred it to be.

Regarding this matter, Green emphatically testified that before March 25, she was very reluctant to accuse anyone of deliberately doing these things unless she was certain of the individual's identity. However, on March 25, she had been told by another employee that that employee had seen Maloney untying the string from the door and had decided to report this to Green, because it was such a "creepy" thing for Maloney to do. Green then assumed that Maloney had also been deliberately closing the vent and relocating her paper towel holder in order to harass her. She related this to George on March 25, specifically telling him that another employee had informed her that Maloney had untied the string from the door. During her testimony Green was asked several times to attempt to recollect the name of the employee who had reported this to her, but she was unable to recall the name or even the gender of the employee.²³

While Green's log does not so state, the record evidence, particularly the testimony of Schwanz, establishes that between the dates of March 13 and 26, Green was having frequent, and emotional, conversations with Schwanz regarding her alleged mistreatment by Maloney. Further, Schwanz was aware that on

¹⁷ As noted, initially there had been two desks in the booth, and then one was removed in order to accommodate Green.

¹⁸ However, Wyatt permanently moved it to his side of the booth the following day even though Green had said that she preferred it remain on her side.

¹⁹ Earl was a trainee X-ray technician or radiographer who, according to Maloney, had only been with the Respondent a short time.

²⁰ I do not credit Green's testimony in this regard; rather, I credit the testimony of Maloney, *infra*.

²¹ While her log notes of that meeting state that Schwanz said he would be having a meeting with Maloney and Wyatt on March 14, the following day, no such meeting occurred.

²² Green's purpose for wanting the string tied to the doorknob was simply to permit her to close the door as a courtesy to anyone else who may have happened to be working in the booth when she left at the end of her shift, so that that person would not have to get up and close it; thus, Green stated that she did not want to impose upon her coworkers.

²³ Interestingly, Green did not appear to have trouble recalling any other matters vis-a-vis her relationship with Maloney, and did not explain why she had not entered the name of this anonymous individual in her log when it was fresh in her memory or did not identify the individual to anyone else during her subsequent discussions with supervisors and managers. I do not credit Green's testimony that someone had told her that they had observed Maloney untying the string.

about March 26, the situation was discussed with Maloney by the two leads, Cody and George, during which Maloney denied Green's allegations and in fact initiated the idea that the leads check Green's booth each day to make sure that the conditions were acceptable to her, *infra*; and that thereafter Green had no further problems regarding these particular matters.

The March 28 entry in Green's log appears pertinent herein as being indicative of Green's general emotional state, and is as follows:

3/28—Man—I left about 9–10 pencils in Pat Ms' [sic] drawer with a note saying "I can't use these anymore I thought you might want to have them"—today I found them in my drawer with a note that said "No thanks—Pat" Wow does this guy hate me or what—that he won't even accept pencils from me—which by the way are the companies—and he uses that kind! I'm blown away!

Testifying regarding this entry, Green stated that she made the overture of the pencils to Maloney because she was "still trying to reach him, still trying to get through that hostility." Green testified that when Maloney rejected her offer of the pencils and returned them with his note of "no thanks" it "just really hit my heart. I mean, that hurt me, you know. I know it sounds like a really simple, mundane thing, but the pencils aren't even mine. They're the company's, and I was just trying to do a nice gesture, and even that he rejected."

Green, a devoutly religious person, was accustomed to writing bible verses on the chalkboard as inspirational messages that would get her through the day. Her log entry of April 4, is as follows:

4/3 I had erased the chalk board last night and I put the verse "Shout with joy to God all the earth sing the praises of his name." When I came in the chalk board said "Give to Caesar what is Caesar's, Give to the Lord what is the Lord's & Give to the Steelworkers PCC." Man—I wonder how God feels about his work being add[ed] to?

Testifying about this matter, Green stated that when she read Maloney's corruption of biblical text she "flipped" and immediately summoned Jim McCusker and Mike Earl and showed them what Maloney had written. According to Green, they too are "strong Christians" and were "stunned." Green considered this to be "blasphemy" and "a direct hit . . . a direct insult to me . . . and that was it . . . I couldn't take it anymore." She then had a meeting with Schwanz about the matter, explaining her belief that Maloney's conduct was blasphemous, and that Maloney was harassing her by intentionally making her work environment unbearable. Green testified that, "[I]t got to the point of I was afraid to even see him," and that she would go out of her way to avoid encountering him at shift change. In an earlier deposition, taken as a precautionary measure in the event Green's physical condition would preclude her from testifying in this matter, Green stated that she believed that Maloney's blasphemy "was put there knowing that that would fry my butt . . . and it did . . . yes it did."

On the following day, April 4, 1997, Maloney was interviewed and suspended by Schwanz, and was terminated on April 10, *infra*. Green testified that after Maloney's termination, "It was heaven. It was absolute heaven"; that her work

environment is now stress free; and that she would quit if Maloney were reinstated.²⁴

On March 25, 1997, the Union filed two Board charges against the Respondent.

The charge in Case 36-CA-7957-1 specifically alleges that James, Schwanz, and Damien have harassed, intimidated, and threatened Maloney by conduct described here; and the charge in Case 36-CA-7957-2 alleges various additional acts of unlawful conduct committed by the Respondent, and specifically by Mark Donegan, the Respondent's executive vice president, throughout the times material. Both charges specifically request, in light of the Respondent's egregious unfair labor practices as alleged in these and prior charges, and the card majority obtained by the Union prior to the election, that the Board impose a bargaining order remedy against the Respondent.

Maloney was unaware of the March 13, 1997 complaint filed by Green or of any of Green's aforementioned harassment allegations until about March 26, 1997, when he was advised by two leadmen, Ralph George, Green's swing-shift leadman, and Larry Cody, Maloney's day-shift leadman, of Green's complaint that she believed Maloney was harassing her by moving some of her things around in the booth and by untying a string or length of twine from the doorknob. Maloney denied any involvement; and to avoid any problems with Green he immediately, in the presence of the two leadmen, tied the string tightly to the door knob and then glued it to the knob with "Lock Tight" glue so that it would not come untied or slip off. Maloney told them that he had absolutely not touched Green's paper towel rack, and that he had nothing to do with moving any of Green's things. Maloney advised Cody and George that, as they knew, anyone had access to the room since the door could not be locked; and he requested that they inspect the booth after he left work each day to verify that it was acceptable to Green.²⁵

Maloney testified that during this discussion with Cody and George nothing was mentioned about Green's complaint regarding the vent in the room. Had he been asked about this, he would have related the following: that the ductwork passing through the booth carries only cold air from a remote air-conditioning unit into a nearby darkroom that must be kept at a temperature of 72 degrees at all times, and that with the vent open the booth gets too cold for him; the only way to make the room warmer is to close the vent, and if he found the vent open when he arrived at work he would close it because he would be

²⁴ Mo Fitzpatrick, a longtime employee of the Respondent and an active union adherent, testified that the day following Maloney's termination, as she was going to her work area, she overheard Green saying to Patty Dolan, a member of the antiunion committee, "We got him. We got him. We got . . . Pat Maloney." Green denied making this remark.

²⁵ Leadman Ralph George, a current employee, corroborated Maloney's testimony, stating that he and Cody had such a conversation with both Wyatt and Maloney. During this conversation Wyatt said that simply opening the door would cause the string to come off the doorknob, and either Wyatt or Maloney glued the string to the door so that this could not happen; both of them denied that they had anything to do with Green's problems; and both of them requested that George check the booth every day and make sure that nothing was tampered with. George did so, and there were no further complaints about such matters by Green.

"freezing" if the vent remained open during his shift. At no time did anyone tell him that this was a problem for Green.²⁶

Maloney testified that he had no idea who was doing any of the things that Green attributed to him, and that until April 4, 1997, when he was suspended, he heard no more about any of Green's concerns and believed that his gluing of the string to the door and his requesting that the room be inspected daily at the start of Green's shift had resolved any concerns that Green may have had.

Regarding the casting that Green wanted removed from the booth on March 6, Maloney testified that he had been reading X-rays of that casting and therefore found it convenient to have it located nearby. It had been placed on a rolling platform in the room, and he assumed that Green would be working on the same product after he left. As he was preparing to leave work for the day, Green asked him if he would move the casting because it was in her way. He said, "Okay. I'm in hurry, but I'll move it, no problem. I just thought that's why we moved the desks around." Maloney acknowledges that he did believe that the part was not blocking Green's access to her desk, and that therefore Green's request seemed puzzling. Wyatt came in and assisted Maloney as it took the two of them to move the heavy casting outside the door. Wyatt had left a rolling tool box on their side of the room as the space on his side was limited, and Wyatt said that he would move it out of Green's way. Green said that he didn't have to and Wyatt said, "No, I better get it out of here, I don't want any . . . trouble," and he moved it out.

Regarding the chalkboard, Maloney testified that it was a community bulletin board and an amusing diversion for anyone who might want to utilize it, and that anyone was free to erase, modify, or add to it as they pleased. He had written his "Steelworkers Code of Ethics" on it; on another occasion he wrote, "Losers quit when they're tired, and winners quit when they've won"; and he wrote other such thoughts. And both Wyatt and Green also wrote things on the board. Usually, Green's writings were verses from the bible. Contrary to Green's testimony, Maloney testified that Green had never told him that she was displeased with anything appearing on the chalkboard.²⁷

On one occasion, Maloney wrote on the chalkboard, "What do you want? To play games or make a change." Maloney testified that he was not directing this phrase at anyone in particular or necessarily to any issue; rather, it was merely a rhetorical phrase that he had seen on a T-shirt and thought was interesting, and was perhaps apropos as a message to union adherents who would come to the booth to talk with Maloney and Wyatt about current union matters. The day after he had written this, Maloney observed that the words, "Who is you?" were written, in very large letters, obviously by Green, across Maloney's quotation. Maloney merely thought Green's phrase was humorous because it appeared grammatically incorrect, and he did not attach any particular significance to it at all. That is all Maloney knew about the matter. The next day he noticed that both messages had been erased and that someone, not Maloney, had written "HOO IZ U." Maloney testified that he has no idea who wrote this latter remark, and that Green did not question him or voice any concern to him about the matter.

²⁶ I credit Maloney's rebutted testimony regarding his reasons for closing the vent.

²⁷ I credit Maloney's testimony in this regard.

On April 4, 1997, when Maloney arrived at work, he was told by two employees that "[t]hey got Fred [Wyatt]." Then Wyatt, accompanied by Area Manager Schuster, entered the booth. Wyatt, said, "They're saying I harassed her," referencing Green by pointing to the chalkboard which was filled with some additional scriptures. Schuster told Wyatt to keep quiet and get his stuff and get moving. Shortly thereafter, Supervisor James entered the booth and ordered Maloney to accompany him to HR. On the way he advised Maloney that he could be assisted by an area representative if he wanted one, and that Mark Prosser could serve in this capacity and was already waiting in HR.²⁸ Maloney asked why he would be needing an area representative, and James said that they could talk about it when they got to HR.

In the HR office Schwanz told Maloney that he had received some charges from Green and Ted Blakeley, and that Maloney was going to be suspended pending the investigation of the charges. Schwanz showed him Green's March 13, 1997 complaint, and asked if Maloney was willing to respond. Maloney, who was nervous and upset at the time, explained that Green had asked him to move the casting and that he had done so, and that there wasn't any anger on his part or anything negative that he had done.²⁹ Maloney also explained his March 26 conversation with the leadpersons regarding the additional concerns of Green: he related that he had glued the string to the doorknob so that the string could not be removed; he related that he had asked the leads to inspect the room each day to make sure that nothing was out of place for Green; and he told Schwanz that, as he had explained to the leadpersons, he had had nothing to do with Green's paper towel holder being moved. During this interview with Schwanz Maloney was not made aware of the fact that Green had found the aforementioned chalkboard quotation to be offensive or objectionable.

On being shown Blakeley's complaint, Maloney told Schwanz that he had no knowledge of anything pertaining to Blakeley, who worked in Maloney's booth on the graveyard shift, two shifts removed from Maloney's, and that to more fully and adequately respond to all of these matters he would need a copy of both Green's and Blakeley's charges to review with counsel. Schwanz, refusing to provide him with copies of the complaints, announced that he was being suspended for 3 to 5 days after which he would be advised of the Respondent's determination. Area Representative Prosser, on Maloney's behalf, indicated that he was familiar with Green and said that as far as he was concerned her credibility was "pretty shaky." Schwanz replied that "all that will be investigated." Thereupon, Maloney was escorted back to his office, turned off the coffeepot, turned out the lights, and that was the last day he worked for the Respondent.

On April 10, 1997, Maloney was summoned to another meeting with James and Schwanz. They told him that after

²⁸ Apparently "area reps" are employees who volunteer to accompany or represent fellow employees during meetings with management where potential disciplinary matters are discussed.

²⁹ It appears that Maloney did not refer to chalkboard matter: there is nothing in Green's complaint that indicates what her problem was with the chalk board repartee, Schwanz did not suggest to Maloney that Green believed it was an harassing tactic directed at her, and, as Maloney later stated during the conversation, he wanted a copy of the complaint so that he could respond to Green's allegations in a logical, reasonable fashion.

investigating the matter,³⁰ it was determined that the various charges of King, Blakeley, and Green had merit, and that Maloney was being terminated. Maloney's renewed request that he be provided with copies of the charges was again denied. Maloney asked about the status of his 6-month-old October 21, 1996 harassment charge against the Respondent's managers and supervisors. Schwanz said that he had no knowledge of the disposition of this complaint, and suggested that Maloney should contact John Charno, another HR representative, about this matter.³¹

Wyatt testified that prior to the election Green and Maloney seemed to get along well. Maloney always treated everyone well. Wyatt testified that after the election Green seemed to "be on a mission." Wyatt understood that she complained about Maloney and Wyatt untying a string on the door to their booth. It was just a piece of string, one end of which was loosely tied to the door knob and the other end being affixed to a nail that was nailed into the seam of an adjacent wall; sometimes the string would come off the door knob when it was pulled, and sometimes the nail in the seam of the plywood wall it was attached to would come out of the wall. In fact, Wyatt took it upon himself to securely nail it into the plywood so it would not come out. Further, to accommodate Green, Wyatt adjusted the latch on the door so that the door would not catch and would be easier for Green to simply swing open when she arrived at work; he had not been told to do this, but rather felt that it would accommodate Green. Wyatt usually got to work early, before Maloney, and sometimes the string was just not attached to the door knob. Sometimes he retied it and sometimes he did not, as he did not think it made too much difference. Green, according to Wyatt, also complained about a towel rack and claimed that it had been placed up too high for her to reach. Wyatt knew that Maloney didn't use this towel rack.³²

Wyatt testified that he, Maloney and Green would often write sayings or messages, either work-related or personal, on the chalkboard, and Green would often write scriptures. Once Wyatt wrote, "Look busy, Jesus is coming." Maloney once wrote something like, "Yield unto Caesar that which is Caesar's, and yield unto the Steelworkers Precision Castparts." Green wrote verses from the bible, and would sometimes totally fill up the chalkboard with such scriptures; Wyatt testified that, in fact, Green was able to get up from her wheelchair to reach the very top of the chalkboard. Maloney had composed a "Steelworkers Code of Ethics" that he placed on the chalkboard. According to Wyatt, none of the messages were directed toward anyone or were written for the purpose of ridiculing or insulting anyone, and Green never told Wyatt that she found any of the statements offensive. Each of the three employees had wall space for themselves for the posting of personal items, and Green posted photos and bible verses on the wall space she utilized.

Regarding the large metal casting that was left in the booth on a dolly, Wyatt testified that Maloney was "reading it" at

shift change time. That is, Maloney was reading the X-rays and would compare what he found on the X-rays with the part itself. Maloney left it in the booth one evening since he would continue to be working on it the following day. Green came in and asked Maloney to move it, and Maloney said, "Well, this is what we're reading today. There's nothing else for us to do, so I thought I would just leave this part in the booth, and leave the film here for you." Green said, "No. Take the part out of here." Maloney, speaking in a normal tone of voice, said okay and rolled the part out of the booth. Then Wyatt, who was present during the conversation, started to remove his toolbox because he thought that maybe she didn't want his stuff on that side of the booth. Green told him that it was okay for him to leave the toolbox as she used it to set things on. Wyatt said that he was removing it, and did so.

Wyatt was also suspended on April 4, 1997. When he arrived at work he was told to go to the HR office. In the office were Bob James, Kim Schwanz, and Susan Schuster. They told Wyatt that he had been harassing Ted Blakeley, and that he was being suspended for 3 days pending investigation. He was shown the complaint submitted by Blakeley. Wyatt read it and said, "This is a bunch of bullshit . . . it's all a bunch of frivolous crap . . . and I'm not buying into it." Blakeley was on third shift at the time, and Wyatt said that he never even saw Blakeley, as Blakeley left work as much as an hour before the day shift was to begin. Wyatt was accused of leaving union literature and harassing notes taped to his viewer that Blakeley found to be intimidating. Wyatt asked to see the alleged harassing notes, and Schwanz said that the Respondent didn't have them. Wyatt asked, "What kind of shit is this?" and Schwanz said that "somebody saw [the notes]." Wyatt said that he had never left any union literature taped to his viewer, and asked to see such literature. He was told by the supervisors and managers that they didn't have the literature either.

After a 3-day layoff Wyatt was told that HR had found merit to Blakeley's charges and that it was Wyatt's "behavior," rather than the alleged harassing notes and union literature that constituted intimidation. He was told that he would be reinstated and paid for 1 of his 3 days off, but that his conduct exhibited a chronic behavioral problem and he would have to attend anger management classes for a period of time. Thereafter a charge was filed with the Board by the Union on Wyatt's behalf and, pursuant to the aforementioned settlement agreement, he was fully reinstated with no requirement that he attend such further classes.

Wyatt testified that after Maloney's termination Green continued her conduct, and posted a note near her desk that said something like, "You can put anything you want on this bulletin board, but you don't have the right to mark my stuff." Someone else had been using the room, and Wyatt, who did not know what Green was referring to, went to every supervisor he could find in order to protect himself, explaining that he was afraid that Green was trying to build a case against him, that he didn't know what she was up to, and that he didn't mark on her stuff. Schwanz told him that it wasn't a big deal and that the harassment matter had not been just about Wyatt, it was also about Maloney. Schwanz told him to forget about it and that Schwanz would have the chalkboard removed.³³

³⁰ During the ensuing investigation neither Maloney nor Wyatt, who had also been suspended, was interviewed; further, as found below, Green was not "officially" interviewed until sometime after the Respondent had decided to terminate Maloney.

³¹ Later he was told by Charno that his complaint had been investigated and that it lacked merit.

³² It appears that Green's towel rack was located on the wall on left hand side of the desk, while Maloney's corresponding rack was located on the wall on the right-hand side of the desk.

³³ Shortly thereafter, sometime in April, the Respondent either removed the chalkboard from the booth, or dedicated it as an official company board that was no longer to be used for personal items.

Wyatt testified that he was never interviewed by Schwanz or anyone from HR about Green's allegations against Maloney.

5. Respondent's evidence

Kim Schwanz has been employed by the Respondent for 3 years. His title is human resources generalist, and he has a masters degree in human resources. His immediate supervisor is Mark Damien, as vice president of human resources. Schwanz testified that he oversees some 500 employees and that the nature of his work requires him to investigate various complaints, including one or two harassment complaints each week. During the course of his investigations he must make "very critical" credibility determinations by, *inter alia*, assessing voice inflections and body language, and by developing background information when necessary in order to determine exactly what happened prior to formulating a resolution of the situation. Most of the time, according to Schwanz, it is "very difficult" to ascertain what, in fact, did occur. Once such a determination is made, discipline may be imposed, and may take the form of a warning, interpersonal skill training, and suspension and/or discharge, depending on the severity of the situation. Regarding the initiation of complaints, employees are advised that they are free to proceed directly to HR without first attempting to resolve such matters with their immediate supervisors.

Schwanz testified that he has had a "very cordial," professional relationship with Maloney since he first met him in early 1996. He would customarily see Maloney on a daily basis during his daily 2-hour tour of the production floor in his area of responsibility. Schwanz testified that the Respondent's policy was to permit union "campaigning" only during nonwork time in nonwork areas, and that, on negotiation with the NLRB, hallways were considered work areas.³⁴

Schwanz testified that prior to the election employees would frequently consult him during his daily rounds and inquire about the Respondent's policy regarding campaigning on the work floor. He would tell them that employees were not to campaign in work areas. They would then inform him that, "Pat Maloney was in the area this morning, and he was . . . talking to employees about union issues." Then Schwanz would find Maloney, remind him of the policy, and tell him that an employee had raised the issue and that, "I think you need to back off a little bit." According to Schwanz, this scenario was repeated five or six times in the 4 to 6 weeks prior to the election. Leadman Larry Cody once related that Maloney had entered an employees' booth and had told the employee that "[y]ou'd better sign a card. Pretty soon you're not going to have any friends around here." Schwanz testified that he brought this to Maloney's attention in an informal fashion, characterizing such conversations as "cordial friendly warnings."³⁵

³⁴ Respondent's counsel represented that this matter was resolved with Field Examiner Jeffrey Jacobs in the Board's Subregion 36 office, and that documentation of such understanding would be furnished for the record herein. Further, counsel stated that the results of this understanding were embodied in a document and mailed to each of the Respondent's employees. Contrary to counsel's representations, no such documents were submitted by the Respondent indicating an agreement with the Subregional Office that hallways were considered to be work areas. The relevant documents, R. Exhs. 41 and 42, do not define or refer to hallways as work areas.

³⁵ I do not credit Schwanz' testimony that he gave Maloney such warnings, friendly or otherwise, prior to October 2, 1996, *infra*; Cody was not called as a witness to corroborate Schwanz' testimony.

Schwanz testified, however, that despite these aforementioned "cordial friendly warnings," he did not "form any opinion" as to whether or not Maloney was in fact complying with the Respondent's campaigning rules until on about October 2, 1996, when Area Manager Susan Schuster informed him that Maloney had been observed "engaging in conversation with a few different groups of employees" during working time at one of the Respondent's satellite facilities. Schwanz described this activity of Maloney as, "Going beyond the envelope and [being] well outside the box." Thereupon he prepared an investigation sheet, dated October 2, 1996, and placed it in Maloney's personnel file after giving Maloney a verbal warning. Schwanz testified that he considered Maloney's conduct to constitute "campaigning" and, as such, a direct violation of company policy. Maloney was told that thereafter he would have to restrict such campaigning to nonwork areas during nonwork times.

On October 8, Schuster told Schwanz about another problem. Schuster said that she had received a call from John Erickson, a general manager, who reported that at that very moment Maloney was in the hallway, "campaigning with another employee, Colin McCann." Schuster immediately proceeded to the hallway, observed Maloney talking with McCann, and asked Maloney if he was on break. He said yes. She discovered, however, that he was on vacation time, and thereupon reported the matter to Schwanz, as she did not believe that Maloney had received permission to take vacation time and, further, did not know whether he was permitted to remain on the premises while technically "on vacation."

Thereupon, Schwanz called Robert James, Maloney's supervisor, and instructed James to escort Maloney to HR. Schwanz realized he was dealing "with a hot potato here." Maloney said that he had taken an hour of vacation on successive days in order to do some campaigning in the lunchroom immediately prior to the election. Maloney was asked to step outside the office while Schwanz, Schuster, and James debated the matter amongst themselves in order to ascertain whether Maloney was violating the Respondent's vacation/access policy; they were uncertain of this matter and told Maloney that he would be advised of the resolution of this matter the following day. They did agree, however, that Maloney, by talking with McCann in the hallway, was campaigning in a work area (the hallway), and Maloney was warned that if he continued to violate work rules his employment could be terminated. Maloney, according to Schwanz, said that he felt he was being harassed by management.

The next morning Maloney was told that the Respondent was not going to argue with him regarding his interpretation of the vacation/access policy, even though Schwanz believed that Maloney had violated the policy.

On October 16, 1996, as a result of the aforementioned warning and other matters, Maloney filed an harassment claim against Schwanz and other named supervisors. It was referred to John Charno, another HR generalist, who then became responsible for investigating Maloney's complaint. On November 15, 1996, Schwanz replied as follows to Charno's request for information:

Item #1: Yes, Pat [Maloney] is correct, he did receive a warning. Pat was observed by John Erickson, discussing (campaigning) union issues with another employee, Cole McCann. The two employees were located in the hallway between the lunch room and the wax molding department.

As determined during negotiations with the National Labor Relations Board last spring, that hallway is a designated work area. Pat was well aware that this was a work area and that he could not campaign there.

It is important to note that on October 3, 1996, Pat was given a task to pick up some film cartridges down at the satellite facility. Pat did not simply pick up the cartridges. He proceeded to converse with several employees, which Ron Carnes stated was not work related. Pat was told by Suzanne Whittington to "get the hell out of the building," she later saw him with Steve Fisher and even later talking with a group of employees. Pat was gone from his work station for more than 30 minutes to accomplish a task that should have taken only 15 minutes. That afternoon, Pat met with Susan Schuster, Robert James and myself to discuss his actions. He was duly warned (verbally) that his actions were inappropriate and in violation of company policy and further violation(s) would result in progressive disciplinary action.

The next problem with Maloney occurred in January 1997. Schwanz testified that Ron King and Terrie Trexler hand-delivered King's harassment complaint to him. Both were visibly upset; King was actually frightened and shaking and said he felt he had been threatened, and that whenever he thinks about the incident he becomes upset and frightened, and fears retaliation by Maloney as a result of his very filing of the harassment complaint. He said that Maloney had approached them in the lunchroom at a table they had set up for the purpose of soliciting employees to request the return of their authorization cards from the Union, and that Maloney "towered over the desk, wanting to know what they were doing and what laws they were breaking, and said he was going to come back later with a camera and take their picture." They felt very intimidated by Maloney's conduct.

Schwanz did not talk to any other witnesses regarding the incident although there had been many employees in the lunchroom at the time of the incident; nor did he inquire of King how it was possible for Maloney to have "his hands folded in front in an intimidating manner" and in a "menacing manner" as set forth in King's complaint. Several days later, before Schwanz spoke to Maloney about the matter, King advised him of another recent incident: Maloney and Wyatt happened to be walking in the hallway together while King, heading toward the lunchroom, was walking some distance ahead of them; Maloney said, "Mr. King, when are you going to join us?" and then someone said, "Ron, you motherfucker, when are you going to . . . work somewhere else?"

Thereafter, on January 20, 1997, Schwanz and James met with Maloney regarding King's complaint. Maloney was given the opportunity to read the complaint and at first asked for a copy of it to review with counsel. Maloney, according to Schwanz, was "pretty much reserved" during this meeting, and said that the allegations were bogus. Then, after being told that if he did not cooperate Schwanz would have to make a decision based on the information he had, Maloney proceeded to give his version of the lunchroom incident: that he did approach King and Trexler in the lunchroom, and that he kept his hands clasped in front of him; and that he did not make any statements to King thereafter in the hallway to the effect that Ron

should work somewhere else.³⁶ Maloney told Schwanz that he believed the Respondent was continuing to harass him by calling him to the office and accusing him of harassment toward King.

Despite the foregoing, Schwanz testified that Maloney "did not deny the allegations" and that therefore King's harassment complaint had merit. According to Schwanz, this could have resulted in Maloney's immediate termination. Instead, Maloney was given the following written warning: "[T]hat his continued behavior of harassing co-workers is intolerable and any future, confirmed allegations of harassment, would result in disciplinary action taken, up to and including termination of his employment." Schwanz testified that the incident with King was very serious and would have provided the Respondent with a "golden opportunity" to discharge Maloney if Schwanz was so inclined at the time; however, Maloney was given more leeway than the average employee because he was a "hot potato."

Schwanz testified that between January and March 1997, things were "pretty quiet," meaning, apparently, that during this time Schwanz had received no adverse information or complaints against Maloney. Then, on March 13, 1997, Green verbally complained to Schwanz about the "HOO IZ U" chalkboard incident. She took this as a personal affront. She said that she and Ted Blakeley had both been subjected to a lot of comments on the chalkboard directed against them because they had not supported the Union. Shortly after this discussion with Green, on the same date, Green brought Schwanz her written complaint against Maloney, and there were further discussions about the other alleged incidents. Green said that her relationship with Maloney had broken down after the election when she let him know that she did not vote for the Union, and that thereafter Maloney didn't want anything to do with her. Green, crying and visibly shaking, appeared credible to Schwanz. Thereafter she was on leave for a period of time, and beginning on March 26 he had further discussions with her.

During each of these episodes in Schwanz' office it appears, from Schwanz' testimony, that Green would become emotionally upset and begin crying as she described what she perceived as harassment toward her.³⁷ She described Maloney as "cruel and mean"; he did not like Green changing "his house" or causing him to change his lifestyle; and Green, being a religious person, did not like what she perceived as negative rebuttals to her biblical quotations, characterizing them as "blasphemy." She said that Maloney was like a time bomb waiting to blow up, and that she was subjected to his hostilities and glares. Schwanz testified that during this period he had many such conversations with Green³⁸ and that, "Everyday she was start-

³⁶ While King testified that on January 10, 1997, he was harassed in the hallway by Maloney and Wyatt, who were some distance behind him, and that he heard the words, "Fucking King. Fucking King, why are you not pro-union? Why are you pro-company? You're a fucker," King did not specifically identify either Maloney or Wyatt as the person making these remarks. Schwanz testified only that King "believed" Maloney was the person who made such remarks, and Schwanz admits that he did not investigate this matter by interviewing Wyatt. Whatever occurred, the Respondent has not demonstrated that the January 15, 1997 warning to Maloney was for the alleged hallway epithets rather than the lunchroom incident which was the subject of King's complaint.

³⁷ Indeed, Green exhibited the same demeanor during her testimony.

³⁸ It appears from Schwanz' uncertain testimony that he was not able to distinguish one such conversation from another; indeed, it appears

ing to bring in issues and was becoming very upset.” During these conversations, however, Green never said that she saw Maloney do any of the things that she attributed to him, namely, moving her towel rack, or remove her string from the door, or shutting the vent.

On March 27, 1997, Blakeley also filed a complaint against Wyatt and Maloney. Blakeley told Schwanz that in December 1996, shortly after the election, he was subjected on a regular basis to Maloney’s and Wyatt’s continual discussions about who supported the Union and who did not, and to their repeated grumbling that they had “put their butts on the line for all these people and this is the thanks they’re getting.” Then he advised Schwanz about comments on the chalkboard, apparently the same messages that Green found objectionable, stating, “[M]aybe they were directed at him; maybe they weren’t, but it became a daily thing.” Schwanz then spoke with his superiors, Doug McCabe and Mark Damien, about what should be done.

Then, on April 3, 1997, Green complained to him that in rebuttal to her aforementioned April 2 uplifting bible verse, Maloney had written the blasphemous “Give unto Caesar . . . give unto the Steelworkers PCC” quotation. Schwanz, who had talked with the two leads, Larry Cody and Ralph George, about their earlier conversation with Maloney and Wyatt regarding the string-on-the-doorknob issue and related matters, testified that he viewed Maloney’s latest chalkboard message as “Direct retaliation [by Maloney] for [Green] going to the leads . . . this is really getting to the final straw kind of thing,” and he felt that he had to do something about it. Schwanz testified that the issue “with some of the bulletin board things” caused him to make the decision to sit down with Maloney and Wyatt and “go over the materials with them . . . and make our call from there, because I knew we needed to launch a full investigation of the situation.”

Thereupon, the next day, April 4, 1997, Maloney was summoned to HR. Schwanz, Robert James, Sue Schuster, and Mark Prosser, an area representative, were present. Schwanz handed Maloney the complaints of Green and Blakeley and asked him to respond. According to Schwanz, Maloney’s initial response was, “No comment.” Schwanz said that honesty was required and that he would have to make a decision based on the information he had. Then Maloney replied that he didn’t harass Ted (Blakeley) and said that he didn’t want to make any comments about Green’s complaint; however he did request copies of both complaints.

During his direct examination by the Respondent’s counsel regarding his April 4 interview with Maloney, Schwanz was asked the following questions and gave the following answers:

Q. Did he give you any details at all or respond at all in any—of the details in either of the complaints?

A. No, he did not.

Q. Okay. What did you do at that point?

that some of the conversations with Green took place after Maloney’s April 4 suspension, during Schwanz’ “investigatory interview” with her which occurred, according to his “Investigatory Worksheet,” on April 10, 1997, apparently subsequent to the time Maloney had been discharged. I do not credit Schwanz’ testimony that the investigatory interview with Green took place on May 26, 1997, as one of the items mentioned in Schwanz’ Investigatory Worksheet, notes the “bible verses” incident, and this did not occur until April 3, 1997.

A. At that time, I informed him that we were investigating, and that he was going to be suspended pending that investigation.”

....

Q. Let me back up for one second. When you told Mr. Maloney that if he didn’t respond you’d have to go on the information you got, did he have any reaction?

Not really, no.

After he met with Maloney on April 4, 1997, Schwanz claims that he “began his investigation” by continuing his on-going conversations with Green and Blakeley, and by talking with four other witnesses: Jim McCusker, Green’s trainer on the swing shift, Mike Earl, Bill Zander, and Teresa Ashenburner. The results of his investigation are as follows.

He learned from Earl that Earl had seen “the total definite demeanor change in Green, and a little bit in Ted Blakeley”; that Green would be very upset on a daily basis and she would say that she was just sick and tired of what was happening to her; she would be very depressed every day; and she would “allude” to the way she was being treated by Maloney.

Schwanz claims that he learned from McCusker, who was assigned to train Green on the swing shift, that Green was very upset on a daily basis, and that she had previously talked to him about Maloney. However, Schwanz seemed to negate this testimony by also stating that in fact McCusker did not have any comments regarding Green; and in Schwanz’ investigative notes of his interview with McCusker, there is only an indirect, apparently immaterial, reference to Maloney regarding a note he wrote to Wyatt which does not at all concern Green.

Schwanz admittedly learned nothing from his interviews with Bill Zander and Teresa Ashenburner, who work directly in Green’s area on the swing shift, testifying that neither individual had any relevant input.

Schwanz testified on cross-examination as follows:

Q. Now, do you know if in your investigation—did somebody else tell you that—besides Ms. Green that Pat had blown up at them?

A. No.

Q. [O]r been angry at them?

A. No.³⁹

Schwanz testified that on conducting his investigation he concluded that Green’s claims were “very valid” and that Green was “very genuine and deeply hurt and deeply injured.” Thereupon, Schwanz and Robert James, Maloney’s immediate supervisor, made the decision to discharge Maloney. Asked why the decision was made, Schwanz testified as follows:

Basically, because looking at the fact that . . . we had an employee, Cheryl Green, who was . . . qualified under ADA. We . . . and here we had made an accommodation for her. We put her in this area. She needed—at the time she definitely needed some—some compassion and support of her workers, and instead of getting just that, she got just the opposite. She was actually being singled out, and—harassed directly . . . I feel mental cruelty is the best answer I can give to that.

³⁹ Thereafter, Schwanz testified that McCusker said that both Maloney, but mostly Wyatt, had explosive personalities; however, this conflicts with Schwanz’ Investigation Worksheet notes regarding his interview with McCusker.

Q. Did you feel that Mr. Maloney had been given any opportunity to address these issues?

A. Yes, I did.

Q. What—and why did you feel that?

A. I gave him the opportunity to address it. I asked him. I asked him to address them, and he . . . would not do so.

Q. And how did you give him that opportunity?

A. When we . . . met on the 4th, I asked him to respond, which he chose not to.

Explaining further his rationale for discharging Maloney, Schwanz testified that he had given Maloney a prior warning about harassment in January 1997, in connection with the King incident, and that on that occasion Maloney was advised that if he continued this sort of harassing conduct it could lead to disciplinary action up to and including termination of his employment. In each instance, according to Schwanz, Maloney was specifically focusing his harassment against one employee, King in one instance, and Green in another instance.

Schwanz testified that he submitted the proposed termination memo to Mark Damien, vice president of human resources, Doug McCabe, HR manager for the LBC campus, and Ross Linehart, general manager, prior to delivering it to Maloney. Schwanz testified that Maloney was terminated because he was harassing Green, and that the fact that Maloney had received prior warnings was a factor in the decision to terminate him; in particular, the matter of the King incident was “a very strong factor because it was more specifically at that point about the harassment issue.” However, Schwanz also testified that Maloney would have been discharged because of the harassment of Green even if there had been no prior warnings. Finally, in a related deposition, when asked under oath whether Maloney would have been discharged solely for the harassment of Green absent any prior warnings, Schwanz replied, “Well, maybe; maybe not.”

Regarding Blakeley’s charge against Maloney and Wyatt, Schwanz testified that he believed that Blakeley was “probably overreacting a little bit . . . and that [the charge] was really kind of shaky . . . and it was more aimed at Fred [Wyatt] more so than Pat [Maloney].” However, Schwanz believed there was some merit to it and this resulted in disciplinary action against Wyatt, including the 3-day suspension and loss of wages, even though Blakeley, who had been on the graveyard shift since January 1997, had had no personal contact with Maloney or Wyatt. According to Schwanz, Blakeley’s complaints were primarily related to the notes written on the chalkboard.

According to Schwanz’ rationale, the 3-day suspension imposed on Wyatt was deemed sufficient as Wyatt was a temperamental individual who generally exhibited anger or excitability on an indiscriminate basis, and therefore would benefit from anger management counseling; Maloney, on the other hand, was discharged rather than temporarily suspended because he selected specific individuals, King and Green, as targets for harassment. In other words, Wyatt was prone to involuntary bursts of anger toward coworkers in general, while Maloney was being vindictive toward selective individuals on the basis of their antiunion stance.

C. Analysis and Conclusions

1. The 8(a)(1) violations

I credit the un rebutted testimony of employee Grant Doty, and find that prior to the election Supervisor Bob Runyan, who had observed a lunchtime conversation between Doty, Maloney, and others, approached Doty, asked him if he had been talking about “union stuff,” and warned him “that I should watch what I talk about, and who I hang with, because all levels of management was watching Pat [Maloney] at this time, and they were going to get Pat at no expense. He made a remark that they were going to cut his balls off.”

It is clear from the testimony of various witnesses, namely, Doty, Nance, and Whittington, a former supervisor, that at times material herein Runyan was considered to be a supervisor with special assignment duties, even though he no longer supervised any distinct group of employees on a daily basis. Moreover, at the time he made the aforementioned statement to Doty, the Respondent’s current “Supervisors List—Structurals Division” was posted around the facility and contained Runyan’s name. Accordingly, I find that Runyan possessed managerial and/or supervisory authority during the conversation in question. Moreover, under the circumstances, as Runyan’s name was listed in the Respondent’s posted supervisory roster, Doty was clearly entitled to believe that Runyan’s threatening warning emanated from management.

Warning Doty that he should not speak with Maloney because Maloney was an active union adherent who had been targeted by the Respondent with discharge, clearly constitutes an unlawful threat of adverse action, and is violative of Section 8(a)(1) of the Act, as alleged. See *Pacesetter Corp.*, 307 NLRB 514, 516 (1992).

On two occasions, shortly prior to the election, Schwanz summoned Maloney to the HR office, warned him that he had violated the Respondent’s no-campaigning and no-solicitation rules, and advised him that he was subject to discipline if he continued to engage in such conduct. I credit the testimony of Maloney and find that on each of these occasions he was engaging in casual conversations with coworkers and that, while he may have remarked about the Union or union-related matters with some of them, he was not engaged in soliciting or campaigning by offering them union authorization cards, by distributing union literature, or by actively attempting to procure their vote for the Union. It is clear that because of Maloney’s high profile as a leader of the union movement, his very presence, whether in a work area during working hours or outside the building during lunchtime, was suspect. Thus, supervisors monitored his activities and reported his whereabouts with dispatch whenever he was out of his work area, and while he was in his assigned workplace, I find, Supervisor James was monitoring the activity of employees who might enter or exit his booth. As demonstrated by the un rebutted testimony of other known union adherents, they too were subjected to similar scrutiny, and even manhandled, within the several weeks prior to the election when they went to the restroom, or were on work-related errands outside their immediate work area. In a 1996 reply from Schwanz to HR Generalist Charno, who was investigating Maloney’s charge of harassment for being repeatedly warned about talking to fellow employees, is particularly revealing. Thus Schwanz wrote to his colleague, Charno, that engaging in talk about the Union in the hallway was considered to be “campaigning” in a working area; and that

conversing with fellow employees about anything at the satellite facility, in a working area and during working time, was considered to be a violation of company policy, and would result in progressive disciplinary action.

This contrasts directly with abundant testimony from various employees, set forth above, showing that the Respondent liberally permitted its employees to engage in any type of casual conversation about any subject at any time and in any part of the facility, whether in the lunchroom, in the hallways, or in work areas. And special consideration was given to employees on errands from one facility to another, permitting them to even interrupt the work of former coworkers for an interlude of friendly conversation. The exception to this, during times prior to the election, was that the Respondent did not permit conversations about the Union and, when union adherents were observed participating in conversations, it was simply assumed that their discussions were of the prohibited variety. Under the circumstances, the Respondent's aforementioned warnings to Maloney, who was neither campaigning nor soliciting in working areas, were clearly unlawful. See *Capitol EMI Music, Inc.*, 311 NLRB 997, 1006 (1993); *Kroger Co.*, 311 NLRB 1187, 1193 (1993); *Willamette Industries*, 306 NLRB 1010, 1017 (1992); *Pacesetter Corp.*, supra.

The January 10, 1997 lunchroom incident involving King, Trexler, and Maloney constituted concerted protected activity and union activity by each of the three participants: Clearly King and Trexler, members of an antiunion employee committee, had the right to urge employees to request the return of their authorization cards in order to counteract the Union's request for a bargaining order based on a card majority. Maloney, advocating the Union's position, clearly had a right to oppose such a scheme and to attempt to convince King and Trexler that they were doing the wrong thing. This was a very serious and volatile issue to both the pro and antiunion adherents, and during this period the Respondent's executive vice president was announcing his policy of zero tolerance for union activity while, at the same time, actively soliciting employees to engage in the very activity that King and Trexler were then engaging in, namely, soliciting employees to demand the return of their authorization cards. While King may have sincerely felt intimidated by Maloney's impassioned plea that he rethink what he was doing, nevertheless, King voluntarily placed himself in this position by soliciting in a public area on behalf of an issue that could reasonably provoke a zealous reaction by union advocates.

I find nothing excessive in Maloney's behavior that would remove from him the protection of the Act. He did argue with King in an effort to get him to change his mind, and was admittedly impassioned, but he made no threats, either verbally or physically. During the incident held his hands together in front of him, and there is no record evidence substantiating King's contention that Maloney somehow held his hands "folded in front of him" in an "intimidating" and "menacing" fashion. And Maloney's statement that he might obtain a camera and return later to take a picture is certainly not a provocative, unprotected remark. Thus King and Trexler were sitting at a lunchroom table with large antiunion posters in front of them and with some 40 or 50 employees in the vicinity, and Maloney directly told them that the photo would be used to ascertain what laws they were breaking; there was no threat, overt or implied, that the photo would be used for other than legitimate purposes; moreover, it appears that Maloney was referencing

the antiunion posters, rather than King and Trexler, as the subjects for his photo.

Regarding the matter of the alleged statements made to King by Maloney or Wyatt in the hallway some 2 days after the lunchroom incident, the Respondent has not demonstrated that Maloney made the statements: the testimony of both King and Schwanz, as he recalled King's contentions, is equivocal and indefinite, and there is very little record evidence regarding this matter. In any event, as stated above, it clearly was the lunchroom incident that caused Schwanz to issue the written warning to Maloney.

I find that this warning was unlawful and violative of Section 8(a)(1) of the Act. Such conduct by Maloney as described above clearly does not fall outside the protection of the Act, and constitutes conduct well within the parameters of protected concerted activity. Thus, the Board has stated in *Health Care & Retirement Corp. of America*, 306 NLRB 63, 65 (1992):

The Board has long held that in the context of protected concerted activity by employees, a certain degree of leeway is allowed in terms of the manner in which they conduct themselves. The Board and courts have found, nonetheless, that an employee's flagrant, opprobrious conduct, even though occurring during the course of Section 7 activity, may sometimes lose the protection of the Act and justify disciplinary action on the part of an employer. Not every impropriety, however, places the employee beyond the protection of the Act. For example, the Board and the Courts have found foul language or epithets directed to a member of management insufficient to require forfeiting employee protection under Section 7. (Footnotes omitted.)

See also *Consumers Power Co.*, 282 NLRB 130, 132 (1986); *Keco Industries*, 306 NLRB 15, 16-19 (1992).

2. Maloney's discharge

Prior to the election one of the Respondent's supervisors asked an employee whether he had been speaking to Maloney about "union stuff" during lunch, and warned the employee that Maloney was being watched by "all levels of management" and that they were going to "get him at no expense" and "cut his balls off." At about the same time Maloney was given several warnings by Schwanz for talking to employees, and it has been found that such warnings are violative of the Act. Several months later, on January 15, 1997, Maloney was given another unlawful warning for harassing employee King, who was engaged in implementing the Respondent's companywide antiunion program wherein the Respondent's executive vice president, Donegan, personally emphasized to groups of employees that the election was over and that thereafter he would have "zero tolerance" for any further union activity except for antiunion activity undertaken for the purpose of soliciting employees to demand the return of their authorization cards from the Union. Then, 6 days later, on January 21, 1997, Damien, Schwanz and James entered Maloney's booth and Damien reminded Maloney not to harass anybody, advised him that after the election "a lot of folks had . . . come back to camp, and . . . nobody expected me to come back to camp, but that I'd taken this thing to a level way beyond [what] anybody expected," and further threatened him that, "You . . . better watch out, you better not make any mistakes, because there's nobody in this corporation that's going to lend a hand to help you." Damien, it will be recalled, as vice president and general manager of a

facility in Redmond, Oregon, vice president of human resources for the structurals division in Oregon, and vice president of manufacturing, engineering of the structurals division in Oregon, had told Maloney some months earlier, in September 1996, during a conversation regarding the Union, that, "I just want you to know . . . anybody that fucks me, I'll get even with them, no matter what it takes, no matter how long it takes."⁴⁰

Then, about a week prior to Maloney's discharge, the Union filed two lengthy charges against the Respondent, one on behalf of Maloney wherein Damien, among others, is specifically named and is alleged to have unlawfully threatened and harassed Maloney. The Union requested in both charges that the Board impose a bargaining order remedy under the circumstances.

It was in this context that Maloney was discharged by Schwanz, Damien's HR subordinate, for allegedly harassing Green.

I do not credit much of Schwanz' testimony, and I particularly discredit his assertions that he believed what Green was telling him about Maloney.⁴¹ Green began complaining to Schwanz about Maloney's conduct shortly before March 13, 1997, the date she filed her complaint. Thereafter, Green and Schwanz spoke frequently and Schwanz stated that their conversations were on a daily basis. Yet the matters of which Green complained were not even brought to Maloney's attention until some 2 weeks later, on March 26, 1997, and then not even by Schwanz. Thus, on that date the two leads, Cody and George, met with Wyatt and Maloney regarding Green's concerns. I credit Maloney's un rebutted testimony⁴² and find that at this meeting Maloney denied that he was responsible for any of the matters raised by Green, and even voluntarily affixed the string to the door with glue and suggested that the leads check the booth each day to insure that it met with Green's requirements.

There were a number of individuals who would see Maloney and/or Green on a daily basis and who were responsible for what was happening on their shifts: James (Maloney's supervisor), Matt (Green's supervisor), Cody (Maloney's leadman), George (Green's leadman), and McCusker (a reader who was assigned to train Green). Of these five individuals only one was called as a witness in this proceeding: George, called by the General Counsel, corroborated Maloney's foregoing testimony regarding his March 26 meeting with George and Cody; and further testified that Green had not complained to him

about any such matters prior to that date, and that Maloney specifically denied harassing or inconveniencing Green. Moreover, insofar as the record shows, Schwanz contacted only one of the aforementioned individuals during his investigation of the matter, namely, McCusker, who had nothing negative to say about Maloney. Finally, it is significant that Supervisor James, who, along with Schwanz, allegedly made the decision to terminate Maloney, and who was present during all the meetings with Schwanz and Maloney, was not called as a witness by the Respondent.⁴³

As Schwanz acknowledged that Blakeley's complaint was more directed at Wyatt and, even at that was "really kind of shaky," we are left with Green as Schwanz' only material witness. It is reasonable to assume that Schwanz, during the course of his many conversations with Green, would have asked her how she knew that Maloney, with whom she had virtually no personal contact, was the alleged culprit. It may be assumed that Green, who testified that she would not think of accusing anyone on mere suspicion alone, told Schwanz the same thing that she testified to here, namely, that a coworker, whose name she could not recall, told her that he/she saw Maloney untie the string from the door. Given the fact that Green was keeping a daily log at the time and that the log is silent regarding the identity of this alleged witness, it is inconceivable that Schwanz did not begin to suspect that perhaps Green had an agenda of her own vis-a-vis Maloney, or that in her highly emotional state wherein she caused herself to believe that Maloney hated her because he returned her pencils with a note of "no thanks," she was perhaps mistaken or overreacting to such matters.

I find it totally incomprehensible that Schwanz, who testified to his professional qualifications and, as a core part of his job, his extensive expertise with the resolution of credibility matters, would credit Greens' mere assertions, absent any corroborating evidence, against a highly qualified employee with seventeen years of seniority. Further, I find that Schwanz, understanding that Green's assertions would not withstand scrutiny, found it necessary to profess another rationale in support of his decision, namely, that Maloney did not deny any of Green's contentions, and that therefore Green must be credited by default. Thus, on three different occasions, supra, Schwanz specifically testified that at the suspension meeting on April 4, 1997, he gave Maloney the opportunity to deny Green's assertions but Maloney elected not to do so. In fact, I find, Maloney did very clearly and specifically deny each of the allegations that were brought to his attention, and I discredit Schwanz' testimony in this regard.

We now come to what Schwanz asserted to be the "final straw," namely, that Maloney's "Give unto Caesar . . . Give unto the Steelworkers" chalkboard message was in fact an intentionally irreverent response to Green's biblical quotation of the preceding day and was designed to harass her.⁴⁴ Schwanz claims that he immediately assumed that by this message Maloney was reacting to the fact that Green had reported him to the leads. I do not credit this assertion. Schwanz was well

⁴⁰ I credit the un rebutted testimony of Donald Thurston, who had testified against the Respondent in a representation hearing prior to the election, and find that Damien told him, "that I had screwed him [in] the past, and that if he ever got the opportunity, he'd fire me."

⁴¹ Under the circumstances, it appears unnecessary to analyze the possible motives or reasons that prompted Green to complain about Maloney. Suffice it to say that I credit Mo Fitzpatrick who testified that the day after Maloney was terminated she overheard Cheryl Green saying to Patty Dolan, a member of the antiunion committee, "We got him. We got him. We got . . . Pat Maloney"; I do not credit Green's denial that she made this statement.

⁴² Maloney testified at length in this proceeding and was subjected to extensive and intensive cross-examination by counsel. He appeared to have an excellent recollection of the events in question, and was honest in acknowledging that he told Green that he did not appreciate the way the Respondent was reorganizing his booth without consultation, and that his importuning of King was "impassioned." These were genuine, reasonable reactions, I find, to stressful situations. I find that Maloney was a forthright witness and I credit his testimony in its entirety.

⁴³ I find that the Respondent's failure to call James, who, along with Schwanz, was instrumental in terminating Maloney, provides the basis for an adverse inference that James' testimony would not support the testimony of Schwanz. *Douglas Aircraft Co.*, 308 NLRB 1217 fn. 1 (1992); *Champion Rivet Co.*, 314 NLRB 1097, 1098 fn. 8 (1994).

⁴⁴ The General Counsel asserts, inter alia, that discharging Maloney for writing such a quotation is per se unlawful as the message itself constitutes protected concerted activity.

aware of the fact that the chalkboard was available for any employee's use without restriction, that Maloney utilized it for messages supportive of the Union, that during his shift other prounion employees would regularly enter his booth and the messages could readily be interpreted as being prounion rather than anti-Green, and that if someone did not like a particular message they were free to erase it and replace it with a message of their own preference. There is no showing that the chalkboard was a message center or E-mail-type communication link between employees on different shifts, and Green did not have to worry about any messages authored by anyone else as she was free to simply ignore or erase them and begin her shift with a clean slate on which she could place inspirational messages of her own selection. Finally, it is very significant that Schwanz, asserting that this chalkboard message was the "final straw," never even provided Maloney with an opportunity to demonstrate that the message was not negatively directed at Green but rather was designed to encourage continued support for the Union.

Clearly, the General Counsel has presented an exceedingly strong prima facie case demonstrating that Maloney's discharge was violative of Section 8(a)(3) of the Act. Thereupon, the burden of proof shifts to the Respondent to demonstrate that Maloney was discharged for lawful, nondiscriminatory reasons.⁴⁵ On the basis of the foregoing, I conclude that the Respondent has not sustained this burden. Rather, I find that the Respondent has violated Section 8(a)(3) of the Act, as alleged, by discharging Maloney in retaliation for his lengthy, vocal and persistent activity as a leader of the Union's organizational campaign.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(1) of the Act by threatening employees with adverse action if they are seen speaking to known union activists.

4. The Respondent has violated Section 8(a)(1) of the Act by giving Patrick Maloney various written and verbal warnings in order to cause him to discontinue his lawful union activity.

5. The Respondent has violated Section 8(a)(3) and (1) of the Act by suspending and discharging Patrick Maloney because of his activities on behalf of the Union.

THE REMEDY

Having found that the Respondent has violated and is violating Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act. Further, the Respondent shall be required to offer Patrick Maloney immediate and full reinstatement to his former positions of employment and make him whole for any loss of wages and other benefits he may have suffered by reason of Respondent's discrimination against him in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, the Respondent shall be required to remove from its records, and from Maloney's personnel file or files, any and all references to any verbal or written warnings, and any and all references to his suspension and discharge, and to notify him in writing that these documents have been so expunged. Further, the Respondent shall be required to post an appropriate notice, attached hereto as "Appendix, on each of its bulletin boards at each of its facilities where notices to employees are customarily posted.

[Recommended Order omitted from publication.]

⁴⁵ *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).